

UNITED STATES

v.

HEARING

SALIM AHMED HAMDAN

a/k/a Salim Ahmad Hamdan

a/k/a Salem Ahmed Salem Hamdan

a/k/a Saqr al Jadawy

a/k/a Saqr al Jaddawi

a/k/a Khalid bin Abdallah

a/k/a Khalid wl'd Abdallah

MILITARY COMMISSIONS

held at

Guantanamo Bay, Cuba

on

24 August 2004

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Sessions:

On 24 August 2004

Introduction of Counsel:

Challenges:

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**REVIEW
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The Commissions Hearing was called to order at 1006, 24 August 2004.

PO: This military commission is called to order.

P (CDR XXXX): This military commission is convened by Appointing Order number 04-0004, dated July 13, 2004; copies of which have been furnished to the members of the commission, counsel, and the accused, and which will be marked as Review Exhibit 1 and attached to the record.

There are no corrections noted to the appointing order. The presidential determination that the accused may be subject to trial by military commission has been marked as Review Exhibit 2. Sir, I am providing Exhibits 1 and 2 to the court reporter at this time.

PO: Thank you.

P (CDR XXXX): The charge has been properly approved by the appointing authority and referred to this commission for trial. The prosecution caused a copy of the charge in English and Arabic, the accused's native language, to be served on counsel for the accused on August 6th, 2004 in accordance with counsel's request to personally serve the accused. The prosecution is ready to proceed in the commission trial of United States v. Salim Ahmed Hamdan.

The accused, Commission Members, and Alternate Commission Member named in the appointing order and detailed to this commission are present. All detailed counsel are present.

Gunnery Sergeant XXXX has been detailed court reporter for this commission and has previously been sworn.

A security officer has been detailed for this commission and has previously been sworn.

The interpreters have been detailed for this commission and have been previously sworn. The full names of the interpreters who are providing interpretation for today's hearing are contained in Review Exhibit 3, a copy of which has been previously provided to the defense and to the recorder for inclusion in the record.

PO: Previously signed with the consent of counsel for both sides was RE 3 (sic), the protective order. Is there anyone left to be sworn, Commander?

P (CDR XXXX): Yes, sir. Sergeant XXXX, the bailiff, requires to be sworn in, sir, and I am prepared to administer the oath.

PO: Please swear her.

The bailiff was sworn.

PO: I have been designated as the Presiding Officer of this military commission by the appointing authority and I have previously been sworn. The other members of the commission and the alternate member will now be sworn. All persons in the courtroom, please rise.

The members were sworn.

PO: The commission is now assembled.

Before continuing with preliminary matters, it is necessary for me to inquire into the accused's need for an interpreter.

Mr. Hamdan, are you able to understand and speak English?

ACC: No.

PO: What language do you speak?

ACC: Arabic language.

PO: As previously noted, certified appointers have been -- appointed interpreters have been appointed to this case. Do you understand the language being used by the interpreters?

ACC: Yes.

PO: Please be seated.

Prosecutor, please tell me who detailed you and your qualifications.

P (CDR XXXX): Yes, sir, all members of the prosecution team have been detailed to this military commission by the chief prosecutor. All members of the prosecution are qualified under Military Commission Order Number 1, Paragraph 4(B), and we have previously been sworn. No member of the prosecution has acted in any manner which might tend to disqualify us in this proceeding. The detailing document has been marked as Review Exhibit 5, and I am having the bailiff provide it to you, sir.

PO: Mr. Hamdan, pursuant to Military Commission Order 1, you are now represented by Commander Swift. He has been provided to you at no expense. You can also represent -- request a different military lawyer to represent you. If the person you request is reasonably available, he or she would be appointed to represent you free of charge. However, if you request another military lawyer, and that lawyer is made available, normally Commander Swift would be released. You could, though, request that Commander Swift stay on your case.

You may also be represented by a civilian lawyer who is qualified. This lawyer would represent you at no expense to the government. He or she must be a United States citizen and certified to practice law in the United States, be eligible for a secret

clearance, and agree in writing to comply with the orders and regulations of the commission. If you have a civilian lawyer, your detailed counsel would remain on the case, and your detailed counsel would be present -- will remain on the case, and your detailed counsel will be present during the presentation of all evidence.

Do you understand what I just told you?

ACC: Yes.

PO: Do you have any questions about representation before this commission?

ACC: No.

PO: Do you want to be represented by Commander Swift and no other counsel?

DC (LCDR Swift): May we have a moment, sir?

PO: (Indicating)

Accused and counsel conferred.

PO: Do you want to be represented by Commander Swift and no other counsel?

ACC: I need Commander Swift and I need an assistant as well.

PO: Please repeat the translation.

ACC: I need attorney Swift to represent me and I need an assistant with him as well.

PO: Please be seated.

Commander Swift, have you made a request for assistant counsel on the case?

DC (LCDR Swift): Several, sir. None have been granted yet.

PO: Okay. Are you prepared with your client to go forward with this proceeding without an assistant?

DC (LCDR Swift): I am prepared for the limited purposes of this proceeding.

PO: Mr. Hamdan, I want you to take a moment and talk to your counsel. He has told me that he is prepared to go through the hearing today without an assistant. Please -- and that he has made several requests for an assistant defense counsel. Please discuss with your counsel whether or not you believe that he is prepared to go forward today.

ACC: I agree.

PO: Commander Swift, you are prepared to go forward today?

DC (LCDR Swift): Today, I am, sir.

PO: Okay. Thank you, please be seated.

Prosecution, defense, after we finish up here I would like both of you to prepare a memorandum to the chief defense counsel reporting Mr. Hamdan's request to him. Thank you.

P (CDR XXXX): Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: Commander Swift, would you please now announce your detailing qualifications.

DC (LCDR Swift): Sir, and to the commission, I have been detailed to this military commission by the Chief Defense Counsel. I am qualified under Military Commission Order Number 1, Paragraph 4(C), and I have been previously sworn. I have not acted in any manner that might tend to disqualify me in this proceeding. The document detailing me as counsel has been previously furnished to the Military Commission, and I request that it be marked as a

review exhibit.

PO: Thank you, please be seated.

DC (LCDR Swift): If I might, sir.

PO: You may.

DC (LCDR Swift): Additionally, for the commission's information seated with me at counsel table are my interpreter, who is not an attorney, but assists me in communication with Mr. Hamdan, and my paralegal, LNL Kreinhop, who is not an attorney but assists me with note taking for the purposes of this proceeding.

PO: Thank you. All person --

DC (LCDR Swift): Actually, one other administrative matter I noted.

PO: Yes.

DC (LCDR Swift): I would like to put on the record at some point the two meetings that we had.

PO: I was going to, but you can put them on right now if you want.

DC (LCDR Swift): Certainly, sir. On 23 August, at 1300, there was meeting with the Presiding Officer, the prosecution --

PO: Composed of Commander XXXX and Captain XXXX.

DC (LCDR Swift): Yes, sir, and myself. During this meeting we discussed the script for conducting this hearing, considerations for the translators, the need for a security officer, and the fact that at that time we did not yet have one, implications of delaying this hearing vis-a-vis the media, voir dire, how we would handle challenges for cause if any, Mr. Hamdan's mental fitness for trial, how to handle upcoming motions, government and defense's

viewpoints regarding the assistant to the presiding officer, General Hemmingway's memo to the presiding officer, and how to handle any requests for continuance made at this hearing.

PO: Do you have anything you want to add to that?

P (CDR XXXX): No objection and nothing to add, sir.

PO: I would note that some of those matters were handled as part of the modification to the trial script.

DC (LCDR Swift): Yes.

PO: And how about the meeting this morning?

DC (LCDR Swift): Yes, sir. This morning we met again at 0900.

PO: Same parties?

DC (LCDR Swift): Same parties, sir. We discussed the question of how to certify, or present, interlocutory questions to the appointing authority by the presiding officer. Again, reviewed how we would handle the motions for today, briefly discussed the issue of headphones for the interpreters, and were notified during the meeting that the CCTV feed was out and that we might have to delay or consider -- and we requested to consider delaying to restore it.

P (CDR XXXX): Sir, no objections to those facts. Just for the record the issue with the headphones was engaged upon by the prosecution team, and the headphones were provided to the defense.

PO: Good stuff. Anything else?

DC (LCDR Swift): No, sir.

PO: Thank you.

All personnel appear to have the requisite qualifications, and all personnel required to be sworn have been sworn.

P (CDR XXXX): Sir, if I could, I would like to mark so that we keep --

PO: Mark away --

P (CDR XXXX): -- in order, the memorandum detailing the defense counsel as Review Exhibit 6, and I have marked the charge sheet as Review Exhibit 7, and I can provide those to the bailiff to provide to the court reporter.

PO: Commander Swift, you have been given a copy of the charge already; right?

DC (LCDR Swift): Yes, sir, I have.

PO: All parties to the trial have been furnished with a copy of the charges. The prosecutor will announce the general nature of the charge.

P (CDR XXXX): The general nature of the charges in this case is conspiracy to commit the offenses of attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism.

PO: Members, and the alternate member, this time is appropriate for you to review the charge sheet and the appointing order there in the packets in front of you. Before you look at the charge sheet, please turn to the appointing order.

Is your data correct on that, Colonel XXXX?

CM (Col XXXX): Yes, it is.

PO: Colonel XXXX?

CM (Col XXXX): Yes, it is.

PO: Colonel XXXX?

CM (Col XXXX): Yes, it is.

PO: Lieutenant Colonel XXXX?

CM (LtCol XXXX): Yes, it is.

PO: Lieutenant Colonel XXXX?

CM (LtCol XXXX): Yes, sir.

PO: Thank you. Take a moment and look at the charge sheet please.

The panel members did as directed.

PO: While they are reviewing the charges, Commander XXXX, was the security officer previously sworn?

P (CDR XXXX): Yes, sir, he was. Also, sir, one other detail in the marking of the exhibits, I believe that Review Exhibit 3 was the document containing the interpreters names, and Review Exhibit 4 was the protective order relating to the interpreters.

PO: Thank you. Okay. Great.

P (CDR XXXX): Thank you, sir.

DC (LCDR Swift): Sir, while again while reviewing, Mr. Hamdan had difficulty understanding the summary of charges when they were read by them. He did not really understand the translation when it was read to him. Could we have that part redone?

PO: Would you please, while the members are reviewing the charge sheet, stand up and restate the general nature of the charges.

P (CDR XXXX): Yes, sir. The general nature of the charge in this case is conspiracy to commit the offenses

of attacking civilians, attacking civilian objects, murder by unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism.

PO: Commander Swift?

DC (LCDR Swift): He seems to understand, sir.

PO: All members had an opportunity to review the charges? Apparently so.

Does either side want the charges to be read in open court? Trial?

P (CDR XXXX): Prosecution does not.

DC (LCDR Swift): One moment, sir. We waive reading of the charges, sir.

PO: The reading of the charges may be omitted.

Okay. Members of the commission and alternate member, the appointing authority who detailed you to this commission has the ability to remove you from service on this commission for good cause. Is any member, or alternate, aware of any matter that you feel might affect your impartiality, or ability to sit as a commission member, which you have not identified previously in the questionnaire you filled out? Before you answer please keep in mind that any statement you might make should be in general terms.

CM (LtCol XXXX): No, sir.

CM (Col XXXX): No, sir.

CM (Col XXXX): No, sir.

CM (Col XXXX): No, sir.

CM (LtCol XXXX): No, sir.

PO: Apparently not. Okay.

I have previously filled out a commission member questionnaire. I previously provided counsel for both sides a summarized biography, a list of matters that one would ordinarily expect counsel to ask during a voir dire process, and a document concerning my knowledge of the appointing authority and other persons. I also provided all counsel with answers to other questions suggested by defense counsel. These documents will now be marked as the next RE in order. The documents are true to the best of my knowledge and belief. That document will be RE 8.

Does either side wish to voir dire me outside the presence of other members?

P (CDR XXXX): No, sir.

DC (LCDR Swift): Yes, sir.

PO: The other members will retire to the deliberation room.

The panel members exited the hearing room.

PO: Please be seated. Let the record reflect the other members have left the deliberation room.

I intend to keep a copy of RE 8 with me during voir dire so counsel may direct me to a specific question. Objection?

P (CDR XXXX): No, sir.

DC (LCDR Swift): No, sir.

PO: Prosecution, voir dire?

P (CDR XXXX): Sir, I believe Commander Swift requested to question you, so --

PO: No, he requested voir dire outside the presence of other members.

P (CDR XXXX): Aye, sir.

PO: They are gone.

Do you want to voir dire me?

P (CDR XXXX): Not at this time, sir.

PO: Commander Swift?

DC (LCDR Swift): We don't have a podium, sir. Permission to move to the court table.

PO: (Indicating)

DC (LCDR Swift): Sir, I would like to start by clarifying your membership in the Virginia bar. You indicated that you had been admitted to practice in the Virginia bar, I believe since the 1970s; is that correct?

PO: Yes.

P (CDR XXXX): What? I didn't understand.

DC (LCDR Swift): I will restate the question. I would like you -- what -- as a member of the Virginia bar what is your current position in the bar?

PO: I am an associate member of the Virginia bar.

DC (LCDR Swift): What does associate member mean?

PO: You would have to ask the Virginia bar. I have never practiced law in the civilian sector.

DC (LCDR Swift): Are you eligible to practice law in Virginia currently?

PO: I am an associate member of the Virginia bar. I am eligible to practice in Virginia if I change my

status to active member.

DC (LCDR Swift): What would be required to do that?

PO: I would have to take some -- a CLE.

DC (LCDR Swift): So at this time you are not eligible to practice there?

PO: At this time I am not an active member of the Virginia bar.

DC (LCDR Swift): Are you a member in good standing --

PO: Go on.

DC (LCDR Swift): Are you a member in good standing of any other U.S. court.

PO: We have got a problem, Commander Swift. The audience cannot hear you. We are going to have to do something. I don't know if you could remove the microphone. I don't know if you can move the microphone.

DC (LCDR Swift): I will stay back here, sir.

MJ: I am only a member of the Virginia bar. That's the only bar I am a member of.

DC (LCDR Swift): Sir, would you be eligible to serve as a civilian defense counsel for this commission proceedings?

PO: I don't know. I haven't examined that.

DC (LCDR Swift): It requires you to be in good standing and a member of a court.

PO: I don't know. I haven't examined that. That question has been addressed in a CAAF case I believe.

DC (LCDR Swift): I am aware of the CAAF case, sir.

PO: Okay. Go on.

DC (LCDR Swift): You indicated that you volunteered?

PO: Yes, I did.

DC (LCDR Swift): Why?

PO: I retired in 1999 and I had no desire to do anything particularly. I had ten years of experience as a military judge, and I thought I was good at it. As a matter of fact, I still think I was good at it; and knowing the stresses and strains brought upon our military by the current operational environment and recognizing that retired people could serve, I volunteered.

DC (LCDR Swift): You in that question indicated you had been in a former military judge. Did you view when you were volunteering that you were volunteering to be a judge here?

PO: No. I viewed that I was volunteering to be a presiding officer.

DC (LCDR Swift): What did you think the presiding officer would do?

PO: At the time that I initially volunteered, the only document that had been written was MCO Number 1 -- excuse me, as well as the president's military order. I went to a dictionary and looked up presiding, and I thought that a presiding officer would preside. If you are asking me if I was aware of all of the differences between a military judge and a presiding officer, I couldn't say that I was. However, I knew that I was not volunteering to be a military judge.

DC (LCDR Swift): You mentioned that the military order and the Presidential's order had been written at the time that you volunteered. Did you read both of those documents before you volunteered?

PO: I scanned them.

DC (LCDR Swift): After scanning them, did you believe that the process was lawful?

PO: I choose not answer that question at this time.
Thank you.

DC (LCDR Swift): Understand that you won't answer the question. You have an open mind now to the question of the lawfulness of the process?

PO: That's a good question. Yes, I believe that the lawfulness of establishing the commission process by the President, the lawfulness, the delegation to the Secretary and to the general counsel are all matters which may be addressed by motion. And, I believe that it is the duty of counsel to educate all members of the commission on the law.

DC (LCDR Swift): As part of your assignment or as part of being assigned as presiding officer, you have been detailed an assistant to the presiding officer?

PO: Yes.

DC (LCDR Swift): Can you describe how that happened?

PO: I believe I put the dates in my questionnaire, but basically on the 29th of June, I believe, Lieutenant Colonel XXXX, who works in the office of the military commissions, e-mailed me and said words to the effect of we are looking for someone to be an assistant to the presiding officer. Do you have any suggestions? Immediately and without giving the person in question a chance to comment I said, yes, Mr. XXXX. And I pointed out that I was aware of XXXX and his good sides and his bad sides. After that, Colonel XXXX e-mailed me back for his e-mail address and they talked.

DC (LCDR Swift): Was he appointed as your assistant?

PO: There was a detailing agreement. There is a detailing agreement between Mr. XXXX and -- no, between the XXXX part of the Department of Homeland Security which is where Mr. XXXX is an instructor on the law and DoD, Office of General Counsel. So if that's appointed, that's a detailing -- he is on detail for a year.

DC (LCDR Swift): Can you explain what his duties are?

P (CDR XXXX): Sir, at this time I am going to object. What we are trying to determine is whether you are qualified to preside over this proceeding. Mr. XXXX is not a voting member and we feel this line of questioning is unwarranted.

PO: Thank you. Go on. Just tell me, ask me your question.

DC (LCDR Swift): I will get quickly to it, sir.

PO: That is fine.

DC (LCDR Swift): You supervise Mr. XXXX; is that correct?

PO: Yes.

DC (LCDR Swift): Mr. XXXX has had contact with the appointing authority; is that correct?

PO: Yes.

DC (LCDR Swift): Did he do so at your direction?

PO: He has done many -- he has had many contacts with the appointing authority at my direction. He has had many contacts with the appointing authority at my consent. He has had many contacts with the appointing authority that I didn't hear about until after he talked to him. His duties are divided into various ranges. For instance, he has been here since the 9th of August arranging to get things done. When the CCTV broke down this morning, he was the one who arranged to get it fixed. When

your interpreter couldn't get a head set, he was the one to whom you came to get a head set. That's one set. He also is the best person I have ever known for drafting, writing, coordinating, and publishing procedures; and he works in that area. He also functions to work out the procedural aspects of the cases. For instance, he has provided to all counsel on this case a listing of all the motions and responses and whatever. Okay, those are three general areas.

DC (LCDR Swift): I want to address, second, the publishing and drawing of scripts, et cetera.

PO: Okay. Go on.

DC (LCDR Swift): Does he work exclusively for you in that capacity or has he worked exclusively for you in that capacity?

PO: On the 19th of August I believe, I could be wrong, the appointing authority published a memorandum stating that Mr. XXXX worked exclusively for me. So there you know -- just a second, we know from the 19th he works for me; right?

DC (LCDR Swift): Yes, sir.

PO: Okay. Before that he provided, and you have got copies of all of this, various suggestions to the office of military commissions on how to write or create procedural changes and the procedures for these commissions. There.

DC (LCDR Swift): Was that after charges had been referred against Mr. Hamdan?

PO: Right.

DC (LCDR Swift): So he was writing how to change the procedures after the charges had been referred?

PO: Right.

DC (LCDR Swift): And you viewed that as appropriate?

PO: Yeah, I did.

DC (LCDR Swift): It didn't concern you that it would be ex pos facto changes after we had established a commission and charges had been referred to it?

PO: I didn't consider that the changes would come into effect in any time to affect anyone. These were changes to the commission procedures as a whole, not changes necessarily affecting Mr. Hamdan and if you believe that they would then I would have expected you to file some motion saying that these procedures can't be changed because they would affect Mr. Hamdan adversely.

DC (LCDR Swift): To date, I don't know that any have, but I know communication has occurred.

PO: Thank you.

DC (LCDR Swift): So I would respond that until they actually are changed there is no ex pos facto issue.

PO: Thank you. I agree.

DC (LCDR Swift): What I am concerned about though is that there is conversations about changing and applying them to ex pos facto.

PO: Okay, that's that concern. Go on.

DC (LCDR Swift): Other than the meetings that we put on the record earlier, have you met with military counsel regarding those proceedings in the past?

PO: I had that meeting with all the counsel on or about, all the counsel who were in D.C. on or about the 15th of July. And I had a meeting with all the counsel who showed up yesterday on the 23rd of August.

DC (LCDR Swift): During that meeting on 15 July, did you express an opinion regarding speedy -- the right of any detainee to a speedy trial?

PO: No, I didn't.

DC (LCDR Swift): I wasn't at the meeting, but I was told that you did. I don't --

PO: Thank you.

DC (LCDR Swift): Did you mention speedy trial at all?

PO: Speedy trial was mentioned. Article 10 was mentioned, and there was some general conversation. I didn't take notes at the meeting. It was a meeting to tell people who I was and asking them to get -- start on motions and things.

DC (LCDR Swift): But you didn't expect -- while those things were mentioned, you don't recall expressing an opinion yourself?

PO: No. I didn't have any motions or anything.

DC (LCDR Swift): Now, based on the trial script that we have been provided, you intend to instruct the members on the law; is that correct?

PO: Yes.

DC (LCDR Swift): How are you going to avoid having an inordinate influence in respect to each of their opinions while doing that?

PO: I don't understand your question.

DC (LCDR Swift): Well, historically and certainly barrowing from the judge's bench book, it says that each member should have an equal weight in deciding any opinion. Here they are deciding both fact and law. How, after you have instructed them, will they have the opportunity to have an equal opinion as to what the law is?

PO: You refer to the trial script. Did you read farther what I said there?

DC (LCDR Swift): I did.

PO: What did I say?

DC (LCDR Swift): In that portion, you said that they were free to disagree with you.

PO: And?

DC (LCDR Swift): I also read --

PO: Come on.

DC (LCDR Swift): -- in the trial script where you say to them, "I am the only lawyer; and therefore, I will instruct you on the law." Don't you agree that that gives you positional authority?

PO: Commander Swift, if you are going to read something let's read it all.

DC (LCDR Swift): Yes, sir.

PO: As I am the only lawyer appointed to the commission. Now that is a fact; right?

DC (LCDR Swift): That is true, sir.

PO: I will instruct and advise on the law. However, the President has directed that the commission will decide all questions of law and fact, so you are not bound to accept the law as given to you by me. So what have I told them, okay -- I am not going to argue the point. The point is that they are all military officers. They have all sworn to do their duty and I will advise them on the law as I have been required to do. And, I don't see how you can get around that.

DC (LCDR Swift): My concern comes in their ability after

being instructed that you are a lawyer, and you know the law, that you will have an unequal voice in any deliberations. That is something to be avoided, looked at ranks, looked at procedures, that's not happening, and how would we avoid that with the current instruction that we have? It says you are free to disagree, but I am a lawyer and I am probably right.

PO: Whoa, whoa, it does not say that. But that -- okay, so you object to the instruction?

DC (LCDR Swift): Yes, sir. In determining not only on the instruction also concerned is in your ability to sit as the senior member or as the presiding officer that you will ensure that each member has an equal voice in every decision.

PO: I will.

DC (LCDR Swift): Lastly, influence -- yesterday, during the meeting -- during our meeting yesterday, it was discussed whether we would hold up these proceedings pending the appointment of a security officer. Do you recall that, sir?

PO: Yes.

DC (LCDR Swift): During that, you mentioned that holding it up would have an impact vis-a-vis the media. Do you agree with that?

PO: If you say I did. I believe what you say, but go on.

DC (LCDR Swift): At least by that statement, it sounds like the media is having an impact on how you are making decisions.

PO: No. I think what that statement meant was that having been the poor person who had to orchestrate getting hundreds of people to various places at various times, that I sympathize and that we would do what we could to handle it. For instance, this

morning with the CCTV broke down, we delayed -- we have delayed the start of these proceedings --

DC (LCDR Swift): We have a translation issue, sir. When we switched translators, he is no longer understanding anything being said.

PO: Can we switch to another translator? The court is addressing the table of translators -- the commission is addressing -- I am addressing the table of translators. Can we switch to another translator?

The translators changed positions.

PO: For instance, this morning when we had that CCTV break, we delayed the proceeding for 30 minutes to start so that the feed to the off-site viewing location could be established. If you mean am I concerned about what the media says or writes about me, no.

DC (LCDR Swift): Understand, sir. I don't have any further questions.

PO: Challenge?

P (CDR XXXX): I have some additional questions, sir.

PO: Go on.

P (CDR XXXX): Sir, Military Commission Order Number 1 states that a presiding officer needs to be a military officer whose a judge advocate of any United States armed force. As you sit here today, do you meet that criteria, sir?

PO: Yes.

P (CDR XXXX): Sir, you received some questions from Commander Swift about whether the establishment of commissions was lawful and the executive order was lawful. As you sit here today, have you made any predeterminations with respect to those questions?

PO: All of the counsel in the courtroom are familiar with the Uniform Code of Military Justice. If an order is patently illegal, that is one thing. However, if an order is questionable, which apparently some people thinks it is, then an officer or any member of the service has a duty to comply while determining whether or not it is illegal.

P (CDR XXXX): Now, sir, the notice of motions for the defense was due on the 19th of August. Have they filed any such notice of motion challenging the legality of those orders?

PO: That -- please sit down, Commander Swift. You look like you are about to jump. Don't jump. Don't worry about that.

P (CDR XXXX): Sir, will the role of the assistant to the presiding officer in any way impact your ability to fairly decide matters in this case?

PO: In so far as he takes so much off my back, yes, it will because I don't have to worry about all the admin stuff that he has been sucking up. But in terms of his impacting my vote, my voice, no.

P (CDR XXXX): Now you say that there have been several contacts between Mr. XXXX and, you used the term, appointing authority.

PO: I thought I said OMC, but maybe I didn't. I meant the circle around Mr. Altenburg?

P (CDR XXXX): So that doesn't necessarily mean he is speaking with Mr. Altenburg directly, but could be speaking to the staff person of Mr. Altenburg?

PO: Right.

P (CDR xxxxx): Sir, the issue of speedy trial was brought up and we have, in fact, have notice of motions provided concerning speedy trial. Is there

anything as you sit here right now which will impact your ability to fairly decide those motions?

PO: No.

P (CDR XXXX): As far as your interaction with the other members, do you consider them to have equal votes in this case?

PO: Yes.

P (CDR XXXX): Do you consider them to be on equal footing with respect to votes as to what the law is?

PO: Yes.

P (CDR XXXX): If they need or request assistance, not being legally trained as you are, in trying to determine what the law is will you take steps to get them that assistance?

PO: To get them what?

P (CDR XXXX): Assistance to help them understand the law?

PO: Yes.

P (CDR XXXX): Sir, are you aware of any actions or are underway to hire court clerks to assist the other commission members?

PO: I received -- and I forget when it was -- in the last month a draft, I believe, of a hiring of someone, a position nomination for someone to work in the office of the presiding officers. Where that is I don't know.

P (CDR XXXX): Sir, is the media in any way going to impact your ability to fairly decide this case?

PO: No.

P (CDR XXXX): If it is a question to providing the accused a fair trial and accommodating the media, where

will that decision lie?

PO: We have spent a lot of money to get six people here to look at Mr. Hamdan across this table. We are here so that these six people can carry out to President's order to provide a full and fair trial for Mr. Hamdan.

P (CDR XXXX): I have no further questions, sir.

PO: Thank you.

DC (LCDR Swift): May I have a moment?

PO: Yes.

DC (LCDR Swift): Sir, in your answers to Commander XXXX, you indicate that you take steps to assist the other members understanding the law. What steps would those be?

PO: Well, since I don't know -- I am not being sarcastic -- I don't know what the situation would be. The first step is that counsel will provide motions on the law and the second step is that counsel will be allowed to argue what the law is. If the commission members decide that they need any more instruction on the law, then I will decide that then. I don't know. I don't know what they are going to need. I can't tell you what the steps are right now.

Now, some -- you can't predict something about a situation that hasn't arisen yet, Commander Swift. I'm sorry. If your concern is this -- and I don't know why you have been walking around it -- sir, are you going go back in there and say, okay, y'all, I am a lawyer and you are not and this is the law and you got to listen to me. Is that your concern basically?

DC (LCDR Swift): I do not believe you would be, sir. I am more concerned, not that you would intentionally do such a thing, I don't think you would. My concern

is how a lawyer is inevitably viewed by other staff officers. It is the equivalent of my wife, who is a pilot, and I sitting in the cockpit seat and today we are going to fly an airplane and I look over and she says put the throttles forward.

PO: Okay. So is your compliant about me or about any lawyer?

DC (LCDR Swift): My concern is how we can minimize this position and how those steps would be taken to prevent it.

PO: I can't tell you what I will do in an unspecified situation. I can tell you that I am not going to say, I have been a judge for ten years and a JAG for 27 years and you got to tell -- you got to do what I tell you about the law. That's the first thing I can tell you. The second thing is that if they need more assistance on the law I imagine and I don't know, Commander Swift, because it hasn't arisen, that if they need more instruction on the law, I will call you and Commander XXXX back into court and say -- I am using his name in vain -- Colonel XXXX, is your question the application say of IN RE Sierra to 42 U.S.C. 1933, and he will say, yes. And I will say, Commander XXXX, would you explain your views on that; and he will say, whatever. And I will say, does that answer your question; and you will say something, I don't know.

DC (LCDR Swift): I understand, sir.

PO: Okay. However if you feel the urge, I always welcome briefs on any matter. That's not an order for a brief. If you want to put it in, feel free. Okay, what else, what other follow up do you have, Commander Swift?

DC (LCDR Swift): No other follow up.

PO: Challenge?

P (CDR XXXX): Prosecution has no challenge.

DC (LCDR Swift): I would like to recess to consult with my client regarding --

PO: Well, I understand that, but I mean I am asking really what sort of recess do you need? Five minutes in place or fifteen minutes in the office?

DC (LCDR Swift): Fifteen minutes in the office, sir.

PO: Court is in recess.

The Commission Hearing recessed at 1115, 24 August 2004.

The Commission Hearing was called to order at 1142, 24 August 2004.

PO: The commission will come to order. Let the record reflect that only the Presiding Officer is in the commission room. The other members are not present. Defense?

P (CDR XXXX): Sir, before we go further, we have a new court reporter, Sergeant XXXX, and she has previously been sworn.

PO: Thank you.

DC (LCDR Swift): Yes, sir. Before entering challenges, would you permit me one more question, sir?

PO: Yeah.

DC (LCDR Swift): When you said that you are a judge advocate, were you recertified when you came back off of active -- off of retirement, or do you base that on you previously being a judge advocate?

PO: To the best of my knowledge and belief, Major General Tom Rummy -- Thomas Rummy, who is the Judge Advocate General, personally approved my retirement recall, and he is the one who certifies people as judge advocates.

DC (LCDR Swift): And you base that on your belief -- on that belief?

PO: Yeah.

DC (LCDR Swift): Notwithstanding, sir, we do challenge the Presiding Officer for cause. We have three -- excuse me, four areas.

One, we challenge the qualifications of the Presiding Officer as a judge advocate based on being recalled from retired service and not being an active member of any Bar association at the time he was recalled.

Two, despite, we understand that this is almost necessarily by the position you've been placed in, we challenge the Presiding Officer based on that the fact that he will exercise improper influence over the other members.

PO: Okay. I want to make sure you clarify this. Are you challenging the system, or are you challenging me? Because the standard is good cause that I will not perform my duties.

DC (LCDR Swift): We're challenging you, sir.

PO: Okay.

DC (LCDR Swift): We are also challenging based on the multiple contacts that you have had, either through your assistant, or through yourself with the appointing authority. I understand that you said that this is not going to influence you in any way. We believe that it creates the appearance of unfairness, and at least at that level, we challenge on that.

Additionally, based on -- although I did not attend the meeting of 15 July -- based on consultation with counsel that did, we challenge you based on having formed opinions prior to court regarding the

accused's right in this trial -- the accused's right to a speedy trial in this case.

PO: Anything else?

DC (LCDR Swift): No, sir.

PO: What do you say?

P (CDR XXXX): Sir, defense counsel said they're not challenging the system, they're challenging you personally. But they also said during voir dire, I don't think you would ever do anything intentionally unfair. So if it's a challenge to the individual, the prosecution doesn't believe we can do any better than a person who the defense concedes would never intentionally do anything unfair.

The defense has stated many things about conversations between the appointing authority and Mr. XXXX, and the appointing authority and yourself. Specifically, during those conversations between you and defense counsel on voir dire, he stated there's been no prejudice. So as we sit here today, you are not tainted, there has been no prejudice to the defense, and we have had recent changes with respect to the August 19th memo, which should preclude any appearance of this happening in the future.

Sir, we have no challenge and do not feel that there is any cause to challenge you as the Presiding Officer.

PO: I've considered your challenges for cause, Commander Swift. Under the provisions of MCI 8, I'll forward to the appointing authority for his decision and action, a transcript of the voir dire, which will include your challenge and the reasons therefore, and the comments made by counsel. I will also forward the Presiding Officer's voir dire packet, which I believe is RE 8.

Are there any other matters that you would wish to be forwarded to him for his decision?

DC (LCDR Swift): I would wish to be able to brief, as it did come up during the course of this, the issue of qualifications.

PO: When do you think you could have that prepared?

DC (LCDR Swift): Certainly no later than next Monday.

PO: Okay. Well?

DC (LCDR Swift): I'm somewhat at a loss while down here to do that type of thing. But I can complete it by next Monday.

PO: If you will forward that to Commander ~~XXXX~~, and he will provide you with any cross-whatever this is to this matter, and then forward it to me, and I will get it to the appointing authority.

Anything else that should go up with this?

DC (LCDR Swift): The defense has nothing else, sir.

PO: Well, I mean the packet to the appointing authority.

P (CDR ~~XXXX~~): Nothing from the prosecution.

PO: Okay. Under the provisions of MCI 8 paragraph 3(a)(3), I will not hold the proceedings in abeyance.

Okay. Please recall the other members.

The members entered the courtroom.

Please be seated. The commission will come to order. Let the record reflect that all of the members of the commission are present.

Have all the commission members completed a member

questionnaire?

Apparently so.

Have both counsel been provided copies of the member questionnaires?

DC (LCDR Swift): Yes, sir.

P (CDR XXXX): Yes, sir, I have.

PO: Prosecutor, please have the members questionnaires marked as the next RE in order.

P (CDR XXXX): Sir, I've marked them Review Exhibits 9A through 9E. 9A would be Colonel XXX; 9B, Colonel XXXX; 9C, Colonel XXXX; 9D, Lieutenant Colonel XXXX; and 9E, Lieutenant Colonel XXXX. And I'm handing to the bailiff for delivery to the court reporter.

PO: Those questionnaires will be under seal.

Okay. Members, I'm now going to ask you a few preliminary questions. If any member has an affirmative response to any question, please raise your hand. As I ask these questions and make reference to the members, this refers to both the Commission Members and the alternate. And if I failed to state it, the alternate came in with the other members.

Does any member know the accused?

Apparently not.

Does any member know any person named in the charges?

Apparently not.

Does any member know any of the counsel -- Captain XXXX, Commander XXXX, Commander Swift -- involved in this case?

Apparently not.

Members, having seen the accused, having read the charges, do any of you feel that you cannot give the accused a fair trial for any reason?

Apparently not.

Do any of you have any prior knowledge of the facts or events in this case that will make you unable to serve impartially?

Apparently not.

Do any of you feel that you cannot vote fairly and impartially because of a difference in rank, or because of a command relationship with any other member?

Apparently not.

Members, later I am going to instruct you as follows: As I am the only lawyer appointed to the commission, I will instruct you and advise you on the law. However, the President has directed that the commission, meaning all of us, will decide all questions of law and fact. So you are not bound to accept the law as given to you by me. You are free to accept the law as argued to you by counsel either in court, or in motions.

In closed conferences, and during deliberations, my vote and voice will count no more than that of any other member. Can each member follow that instruction?

Apparently so.

Is there any member who believes that he would be required to accept, without question, my instruction on the law?

Apparently not.

Have any of you had any dealings with any of the parties to the trial, to include counsel for either side, other members, including myself, which might affect your performance of duty as a commission member in any way?

Apparently not.

Do any of you feel that you cannot fairly and justly decide this case because of any prior experiences related to previous military assignments or duties?

Apparently not.

Do any of you feel that you cannot fairly and justly decide this case because of something you have read, heard, or seen in the media concerning the events of 9/11, al Qaida, Usama bin Laden, or terrorism generally?

Apparently not.

Have any of you been a victim of an alleged terrorist attack, or had a close friend or family member who was a victim of an alleged terrorist attack?

Apparently not.

Okay. As commission members, we've got to keep open minds regarding the verdict until all of the evidence is in. The verdict can only be based on evidence received during the proceedings, and you may not rely upon prior knowledge of the facts or events no matter how you got this knowledge. Is there any member who cannot follow this instruction?

Apparently not.

Mr. Hamdan is presumed innocent. This presumption remains unless or until his guilt is established

beyond reasonable doubt. The burden to establish Mr. Hamdan's guilt is upon the prosecutor. Does each member understand and agree with this principle, and further agree to follow this principle in deciding this case?

Apparently so.

Does any member know of anything of either a personal or a professional nature which would cause you to be unable to give your full attention to these proceedings throughout the trial?

Apparently not.

Are any of you aware of any matter that might raise a substantial question concerning your participation in this trial as a commission member?

Apparently not.

Any general voir dire of the members, trial? Not individual, general.

P (CDR XXXX): Yes, sir. May I proceed, sir?

PO: Pardon?

P (CDR XXXX): May I proceed, sir?

PO: Yes, I'm sorry.

P (CDR XXXX): Good afternoon, gentlemen. My name is Commander XXXX. Captain XXXX and I represent the prosecution in this case. As all members participating before this commission, we're here to ensure a full and fair trial, and we have a few general questions we'd like to ask of all of you.

Since arriving in Guantanamo Bay, has anyone from the media attempted to talk to you or discuss this case with you?

PO: Apparently not.

P (CDR XXXX): This trial will most likely require your full attention and may play out over several months. Does anyone have anything of a personal or professional nature that would limit your ability to participate over the next several months.

PO: Apparently not.

P (CDR XXXX): Can all members set aside any feelings generated by the attacks of 9/11, and render a verdict in this case that's based solely on the evidence presented?

PO: Apparently so.

P (CDR XXXX): All of you expressed in the questionnaires you filled out previously some concerns for your families as a result of your service on this commission. Do all members feel they can remain impartial towards all parties, and despite those concerns, fairly decide this case?

PO: Apparently, so.

P (CDR XXXX): Also reviewing your previously filled out questionnaires --

PO: Let me note for the record that those questionnaires will be appended at sometime to the record, or they were.

P (CDR XXXX): They were, 9A through E, sir.

PO: Yeah, 9A through E. Okay.

P (CDR XXXX): All of you have naturally seen some news reports on Afghanistan, al Qaida, and other pertinent topics. Can you set aside the generalized information from those reports and decide this case based on the facts presented here?

PO: Apparently, so.

P (CDR XXXX): We thank you. We have no further questions.

PO: General?

DC (LCDR Swift): Good morning, sirs. My name is Lieutenant Commander Charles Swift, and -- I'm too far from the microphone -- and I represent Salim Ahmed Hamdan in this case, and I also have some questions.

Start with, does every member understand what the term "jurisdiction" means in the context of judicial proceedings? Do you understand what that means? They're going to be doing this a lot.

PO: Okay. Members, I'll instruct you on jurisdiction. Basically -- and I, of course will be glad to receive instructions from counsel -- jurisdiction means the authority of a court to hear a case.

DC (LCDR Swift): We would agree with that.

In this case, now having understood what jurisdiction means, in this case, you've been provided with a finding being by the President of the United States that Mr. Hamdan is a person subject to the jurisdiction of this tribunal. The defense challenges --

PO: For the record, I keep waiving my hand at Commander XXXX, at Commander Swift, I even do it to myself. It's because we have a translator here who needs to have us talk slowly. It is not trial, it's not defense, it's not just me, it's all three of us. Go on. I apologize for interrupting you.

DC (LCDR Swift): No problem, sir. It's going to take some getting used to.

I'll start the question again. In this case, you've been provided with a finding by the President of the United States that Mr. Hamdan is a person subject to the jurisdiction of this

tribunal. The defense challenges this finding.

Is each of you willing to consider whether the President's finding is, in fact, lawful?

PO: Apparently so.

DC (LCDR Swift): Apparently so? All are willing to consider that?

PO: Apparently so.

DC (LCDR Swift): Does any member believe that the President's finding is evidence that Mr. Hamdan committed a crime?

PO: Apparently not.

DC (LCDR Swift): That's a negative response from all members.

Does any member believe that the President, in making his findings -- let me restate that. Does any member believe that the President's findings are evidence that Mr. Hamdan has committed a crime?

PO: Will defense agree that a prerequisite to getting this case before this commission was that the President made such a determination?

DC (LCDR Swift): The defense agrees to that, sir.

PO: The Presidential determination was provided to you to show that this -- these charges were properly brought to this court. The determination is not evidence. Everybody understand that?

Apparently so.

DC (LCDR Swift): And to go back, it was -- in saying that it was lawfully brought, that means that that was a step necessary; it does not necessarily mean that the decision itself was lawful.

PO: Could you rephrase?

DC (LCDR Swift): One of my previous questions -- one of my previous questions was, whether every member was willing to consider whether the President had lawfully brought Mr. Hamdan to this -- before this trial, whether he was within the jurisdiction of the commission.

PO: They did agree to that.

DC (LCDR Swift): Yes. I want to clarify that it is a step, but it is not in and of itself evidence that it is lawful.

PO: Okay.

DC (LCDR Swift): Every member agree with that?

PO: Apparently so.

DC (LCDR Swift): Additionally, Mr. Altenburg, who was the appointing authority for this commission, he approved and referred the charges that you have before you. Does any member believe that because Mr. Altenburg approved that charge, that it states a valid offense against the law of war?

PO: Okay. All members understand that the charges were referred to this commission by Mr. John Altenburg who was delegated that duty under the order, the MCO, and the MCIs. All members understand that?

And all members understand that by the document you got, the approval of the charge and the referral, Mr. Altenburg decided that this case should come before this commission. Do you all understand that?

I believe that Commander Swift's question, and he will correct me, is, do you all understand that whether or not Mr. Hamdan is guilty of anything is solely for this commission to determine after hearing all the evidence; and that what Mr.

Altenburg did was just a step to get the charges here? Do you all understand that?

Apparently so.

DC (LCDR Swift): All of that is true, but my question wasn't exactly that.

PO: Well, that's why I said you could clarify.

DC (LCDR Swift): Yes, sir. In addition, one of the things the defense is challenging is that the offense stated is, in fact, a violation of the law of war; that is does it fall within the violations as recognized in international and national law as a law of war violation? To use a lawyer's term, does it even state an offense? What I'm asking is whether you all are willing to listen with an open mind as to whether or not that is true or not?

PO: As to whether or not the offense states a violation of the law of war?

DC (LCDR Swift): That's correct.

PO: Is each member willing to consider, based on submissions by counsel, and the evidence that comes before the commission whether or not the offense as charged does, in fact, violate law of war?

Apparently so.

P (CDR XXXX): Sir, we're going to object to the way that was phrased. We do not desire to argue this during voir dire, but we do think there's a legal issue as to what he characterized --

PO: Thank you.

P (CDR XXXX): -- someone can be convicted of before this commission.

PO: Okay. Members, you're all willing to listen to the arguments from both sides and the evidence;

correct? And what the President did in referring this, and what -- or making a determination, and what Mr. Altenburg did in referring this is not going to affect your decision on findings of guilt; right?

Apparently so.

I can't go any farther than that.

DC (LCDR Swift): Yes, sir.

PO: Go on.

DC (LCDR Swift): In order to decide issues of law, which you were previously instructed you were going to do, you'll be required to consider the meaning of international treaties, the custom and practice as established by military regulations, handbooks, and international cases throughout the world, as well as the Constitution of the United States, federal judicial opinions, and federal statutes. This will require considerable study on your part. Is each of you able to devote the necessary time to gain a complete and independent understanding of the issues of law raised in the case?

Affirmative response from all members.

As Colonel Brownback previously told you, he is the only lawyer on the panel. In this case, do any of you believe that Colonel Brownback's opinion of the law carries a greater weight than your own? His opinion of -- or what he tells you the law is, is it more valid than what you think?

PO: Okay. Are you going to name the members who are giving you responses?

DC (LCDR Swift): I've received a response from Colonel XXXX that's negative, he doesn't believe that the opinion will sway him; Colonel XXXX has responded that the law is the law.

Colonel XXXX, do you agree that your opinion is equal?

CM (LtCol XXXX): Yes.

DC (LCDR Swift): Colonel XXXX?

CM (Col XXXX): Yes, sir.

DC (LCDR Swift): And thank you. It's also going to, of course, be your duty as commission members to weigh the evidence and resolve controverted questions of fact. In so doing, if the evidence is in conflict, you will necessarily be required to give more weight to some evidence than others. It is, of course, your discretion to decide how much weight to give any piece of evidence. However, it is expected that you will use the same standards in weighing evidence -- in weighing and evaluating all of the evidence with that in mind. Is any member less likely to believe the testimony of a Yemeni citizen because of their country of origin, religious or political beliefs, or their relationship to Mr. Hamdan?

Negative response from all members.

Does any member believe that the testimony of a U.S. law enforcement agent is more likely to be true solely because of the agent's position in law enforcement?

Negative response from all members. Thank you.

Does any member believe that the testimony of a U.S. service member is more likely to be true solely because of the agent's position in law enforcement?

Negative response from all members. Thank you.

In weighing and evaluating the evidence, you're expected to use your common sense and your knowledge of human nature and the ways of the

world. Does every member agree that the ways of the world are different in Yemen than they are in the United States?

PO: Apparently so.

DC (LCDR Swift): Does any member have any more than a passing knowledge of Yemen?

Negative response from all members.

The defense is going to present you experts regarding the social customs and practice, living conditions in Yemen. Is each of you willing to consider this testimony, if you find it credible, in evaluating the evidence?

Affirmative response from all members.

This case will also involve as we're seeing right now --

P (CDR XXXX): Sir, at this point I'm going to object. It appears he's arguing the facts of his case rather than finding out if these individuals are qualified to sit for this command.

PO: Thank you, Commander XXXX. Go on.

DC (LCDR Swift): Thank you, sir. This case will also involve issues of translation; that is, statements that have been translated from either Arabic to English, or English to Arabic. Does any member speak Arabic? I didn't think you did from your questionnaires.

PO: Apparently not.

DC (LCDR Swift): No member here speaks Arabic.

Does every member agree that translation is not an exact science?

PO: Apparently so.

DC (LCDR Swift): The quality of translation depends largely on the skill of an individual translator. Is every member willing to consider translation errors in considering the reliability of evidence that will be presented to them?

PO: Apparently so.

DC (LCDR Swift): Thank you. The next questions -- the next group of questions that I'm going to ask you has to do with sentencing. This is difficult because, of course, Mr. Hamdan has not been convicted of any crime, and these questions should not be taken by you as to indicate a belief on my part that Mr. Hamdan is guilty of any crime.

PO: Counsel only have one opportunity to voir dire you, and that's why counsel is asking you questions about sentencing now, because there won't be an opportunity later. Go on.

DC (LCDR Swift): Thank you, sir. And I'll skip the next part because the Presiding Officer just said it.

The range of punishment available to you is anywhere from no time -- no time in confinement to a maximum of life imprisonment. You must be able to consider the entire range. Is every member willing to give the entire range of punishments due consideration?

PO: Apparently so.

DC (LCDR Swift): In deciding what punishment, if any, again, if convicted, to award, is each member willing to consider Mr. Hamdan's educational level, his background, his rehabilitative potential, his role in any crime for which he's convicted?

PO: Might be. For any crime that he might be convicted.

DC (LCDR Swift): Might be convicted, and the fact that he

is not a U.S. citizen or resident; and as such is not under an affirmative duty to obey U.S. law?

PO: Are y'all willing to consider all those matters if we get to sentencing and determining a proper sentence?

CM (Col XXXX): Explain the last part, the very last phrase.

PO: That's from Colonel XXXX.

DC (LCDR Swift): Yes, sir. The last phrase in it, sir, is that Mr. Hamdan is not a citizen, nor a resident of the United States. As such, he would not expect to have an affirmative knowledge of U.S. law or U.S. customs and social practices. So he doesn't have -- generally, we all have a duty to obey international law; but in deciding a punishment, looking at equivalent U.S. punishments may not be appropriate. And I just ask that you consider that.

P (CDR XXXX): Objection. That's in direct violation of a rule, sir.

PO: Thank you, Commander XXXX.

Anything else, Commander Swift?

DC (LCDR Swift): Yes, sir. In deciding -- does any member, having read the charges and specifications, believe that you would be compelled to vote for any particular punishment?

PO: Apparently not.

DC (LCDR Swift): Negative response from all members.

Whether you're aware of it or not, you will soon be aware that in April of this year, I instituted a civil law suit against the President of the United States, Secretary for Defense, Mr. Altenburg, and General Hood on behalf of Mr. Hamdan regarding the

legality of these commissions and his detention.
Does any member believe that I acted improperly in doing so?

PO: Okay. Members, do all members understand the role of defense counsel, in that they have a duty -- and especially military counsel, have a duty zealously to defend their clients. All members understand that; right?

Apparently so.

Does any member have any complaint or objection to counsel performing that role zealously?

Apparently not.

DC (LCDR Swift): But I would still like the reaction if anybody believes that in my zealous representation hearing that, that I somehow stepped over the bounds.

PO: Apparently not.

DC (LCDR Swift): Does any member believe that I acted unprofessionally?

PO: I don't believe the members are capable of answering that question at this time.

DC (LCDR Swift): I meant it not so much as an attorney, but as an officer, sir.

PO: Okay. As I pointed out earlier, military defense counsel are detailed, they're ordered to perform they're tasks, like being ordered to jump out of a plane or fly an airplane or take a hill, it's a duty. Go on.

DC (LCDR Swift): I have no further questions of the members in individual -- in group voir dire, sir.

PO: Okay. Members, we're now going to have various segments of individual voir dire.

Okay. Under the rules, and y'all read this stuff yesterday, I am required to determine if a challenge for cause is made what matters should be forwarded to the appointing authority for his action on that challenge for cause, whether it's against one of y'all or against myself. I'm also required to determine if physically the proceedings should be held in abeyance, whether we should just stop while action is being taken. And I am required to ensure that voir dire remains focussed on the proper subject. That's why I'm going to be remaining in the courtroom during your all's individual voir dire. Any questions?

No, don't stand up yet. I intend to start individual voir dire and drive on. Objection?

P (CDR XXXX): No objection, sir.

DC (LCDR Swift): One moment, sir.

PO: Okay.

DC (LCDR Swift): Sir, could we have a 15-minute recess before starting individual voir dire? Bathroom break.

PO: Okay. Counsel, it appears to me, and this is not your fault --

DC (LCDR Swift): Yes, sir.

PO: -- it appears to me that there's no such thing as a 15-minute recess. Just the logistics involved aren't going to permit it. If you want a recess now, and that's fine with me, let's make it what, 30 minutes, Commander XXXX, or 45 minutes so that y'all can bring in -- is there going to be -- does someone -- has someone gotten food for Mr. Hamdan? Yes, someone's gotten food for Mr. Hamdan, he can eat his lunch, and we can come back at 1300 and start on individual voir dire.

Is that okay with you, Commander XXXX?

P (CDR) Yes, sir.

PO: Okay with you?

DC (LCDR Swift): Yes, sir.

PO: Okay. And what they'll be doing -- well, we'll discuss that after the members leave the courtroom. So we will be prepared to start individual voir dire at, say, 1305; okay?

Okay. The members will retire and we will call the first of you at 1305.

All rise.

The members exited the courtroom.

Please be seated. The commission will come to order. Let the record reflect that the members and the alternate members -- and if I forget to name the alternate member, please advise me if I have neglected to do it -- having left the courtroom. You got any questions on individual voir dire for any members?

P (CDR XXXX): All of them, sir.

PO: We don't have to worry about you telling me, Commander. They're coming in. I'm going to bring them in in order of rank, XXXX, XXXX, XXXX, XXXX, and XXXX. I intend to make available to each member and the alternate member a copy of their questionnaire they prepared just so they can look at. You have it if you want to focus them on Question Number 63; all right?

Okay. Now, does it appear likely, Commander XXXX, that your questioning of any member or alternate member will go into an area which will require a closed session?

P (CDR XXXX): No, sir.

PO: Commander Swift?

DC (LCDR Swift): It does appear likely, but I'd like to ask each of them if they believe we'll be going into a closed -- into an area of --

PO: Okay. Well, let me --

DC (LCDR Swift): I'd like to ask the question to the member, give them a chance to say that that would be secret. They know best, they were there.

PO: Okay. We will then, unless there's objection from counsel, proceed like this: We will go through individual, nonclosed voir dire. We will then determine seriatum -- in sequence, I'm sorry, if any of the members need to be recalled to a closed session. If they do, we will hold a closed session for all of the closed session individual voir dire. And if you have challenges for cause, based on closed session voir dire responses, you will make those challenges during the closed session. At which point, we will then open the proceedings, and you may make challenges on nonclosed session matters. Did I say that correctly?

DC (LCDR Swift): I understood it, sir.

P (CDR XXXX): Got it, sir.

PO: I must have said it correctly. Okay. No objections?

P (CDR XXXX): Nothing further.

DC (LCDR Swift): Nothing further, sir.

PO: Commission's in recess until 1300.

The Commission Hearing recessed at 1229, 24 August 2004.

The Commission Hearing was called to order at 1317,

24 August 2004.

PO: The commission will come to order. Let the record reflect that the presiding officer, Colonel XXXX, are present for individual voir dire. We have a new court reporter. Gunny again, right?

P (CDR XXXX): Gunnery Sergeant XXXX, yes, sir.

PO: Thank you.

Individual voir dire, trial?

P (CDR XXXX): Thank you, sir. Good afternoon, Colonel.

CM (Col XXXX): Good afternoon.

P (CDR XXXX): Colonel, I would like to follow up on some issues that came up when you were being questioned as a group. When the defense counsel was questioning he stated what he believed the sources of law that you are to apply in deciding this case are, and we don't intend to argue right now whether he was correct or not. Although, I will raise that we disagree with what he told you. Do you agree, that as you were instructed you are to determine what law to apply in this case?

CM (Col XXXX): Yes.

P (CDR XXXX): Now, sir, there are orders -- orders and instructions applicable to these military commissions. Have you had the opportunity to review those?

CM (Col XXXX): Yes, I have.

P (CDR XXXX): Assuming that you find these orders and instructions have been lawfully issued, you agree to follow those orders and instructions?

CM (Col XXXX): Yes.

P (CDR XXXX): Now, the defense counsel, when discussing

whether he had jurisdiction in the case and the presiding officer explained the meaning of the term jurisdiction, the defense only referred to violations of the law of war. Now, do you understand the jurisdiction of military commissions applies both over violations of the laws of war, as well as other crimes triable by military commission, and that you will get briefs from the parties on this issue?

CM (Col XXXX): Yes.

P (CDR XXXX): Now, during the group questioning the defense counsel, mentioned a civil lawsuit that he filed on behalf of his client. Do you understand that that lawsuit will only be relevant before this commission if it has some link to a legal, or factual, question that you must determine?

CM (Col XXXX): Yes.

P (CDR XXXX): Now, sir, getting into your questionnaire that I have reviewed and that you previously filled out.

PO: Let the record reflect that I am handing Colonel XXXX a copy, as I stated before, the questionnaire that he prepared in case you wish to focus him on some particular area.

P (CDR XXXX): Thank you, sir. Sir, focussing on Question 1 appears to disclose a professional relationship between you and Colonel XXXX. Could you elaborate on that?

CM (Col XXXX): Yes. My current duty as XXXX of Marine Corps XXXX Command in XXXX. Although I have been stationed there a little over two years; I assumed duties as the XXXX on the 19th of April of this year. Before then in my other duties at XXXX I didn't have a real professional relationship with Colonel XXXX; but as the XXXX of XXXX beginning on the 19th of April, I do because he is

the XXXX of the Marine Corps base at XXXX that falls underneath of XXXX, the Marine Corps XXXX Command.

P (CDR XXXX): Is there any kind of reporting relationship between the two of you involving raters of fitreps, or anything of that nature?

CM (Col XXXX): No, our common -- his rater is the base Commanding Officer; my rater is the commanding general of the Marine Corps XXXX Command.

P (CDR XXXX): Do you feel there is anything involved in this professional relationship with Colonel XXXX that would impact your ability to independently decide the facts of law related to this case?

CM (Col XXXX): None at all.

P (CDR XXXX): Thank you, sir. Now, in response to Question 17 of your questionnaire, you indicated you thought that the publicity associated with this case might impact your family. Do you have any specific concerns of that nature, sir?

CM (Colonel XXXX): None, specific, but I'm sure it is not very hard as I put in my question for people to find out where you live; and I am sure that if anybody should determine that they want to take action that they would know where I live and of course my family lives there.

P (CDR XXXX): And, sir, in view of those concerns can you fairly and impartially perform your duty as a commission member?

CM (Col XXXX): Yes.

P (CDR XXXX): Now, sir, in response to Question 35 you wrote that your regiment in Desert Storm captured thousands of prisoners?

CM (Col XXXX): Yes.

P (CDR XXXX): Were you involved in any interrogations of captured personnel?

CM (Col XXXX): No, I was the -- it wasn't my regiment, of course; I was the XXXX officer. And I wasn't personally involved in the capture of any of the prisoners, nor was I involved in the interrogation of any of them.

P (CDR XXXX): So is it fair to say nothing involved with your Desert Storm experience would impact your ability to sit as a commission member?

CM (Col XXXX): That is a fair statement.

P (CDR XXXX): Thank you for your time, sir.

DC (LCDR Swift): Good afternoon, sir.

CM (Col XXXX): Good afternoon.

PO: Once again I note to the participants that when I waive my hand at Colonel XXXX I am doing so -- or any other member -- solely to try to get them to slow down because the translators are agonizing at length.

DC (LCDR Swift): My client would also like to thank you for that.

Colonel, first I would like to address to the questions regarding the instructions. You have had an opportunity to read over the instructions and orders in this case?

CM (Col XXXX): Yes, I have.

DC (LCDR Swift): Did you note when you read over that the instructions, for instance, were issued by the General Counsel of the Department of Defense?

CM (Col XXXX): Yes.

DC (LCDR Swift): Did you note that they were issued, I believe, in 2003?

CM (Col XXXX): I don't know the specific dates, but I did note the dates on the documents as I read them.

DC (LCDR Swift): Do you believe that the general counsel, because an instruction is issued by the general counsel, that it is necessarily indicative for instance of what are the crimes chargeable by a military commission?

P (CDR XXXX): Sir, I don't understand.

PO: Could you tell me what you mean by that?

DC (LCDR Swift): Yes, sir.

PO: Or tell Colonel XXXX actually?

DC (LCDR Swift): Yes, sir. The general counsel is of course is to provide legal advice to the Secretary of Defense. Do you believe that solely because his -- I am going to use for an example Instruction 2 that outlined the crimes that he believed were triable by military commission. Do you believe that that instruction constitutes the law as -- constitutes the crimes triable by military commission, or do you believes that it is your responsibility to determine what are crimes triable by military commission?

PO: Colonel XXXX, you have received a copy of the charge sheet in this case?

CM (Col XXXX): Yes, I have.

PO: You have already said that you understand that the charge has been referred to this commission to determine if an offense was committed; correct?

CM (Col XXXX): Correct.

PO: You have also stated that the fact that the charge

is written and signed and sent here does not indicate to you that a crime has been committed?

CM (Col XXXX): Correct.

PO: Now, does it matter to you as you are sitting here whether the general counsel of the Secretary of Defense or some Captain JAG is the one who wrote those offenses that are before you?

CM (Col XXXX): No.

PO: You are going to determine whether an offense was committed based on the evidence brought before you?

CM (Col XXXX): Correct.

DC (LCDR Swift): I am not sure and this comes from my inartful phrasing of the question, and I would like to try again. Do you believe that the general counsel by virtue of his role and delegation from the President is the authoritative source for what are violations of the law of war?

PO: Colonel XXXX, have you already agreed to listen to what the counsel tell you what the law of war is?

CM (XXXX): Yes. I guess another way to answer your question is do I think they made a mistake?

DC (LCDR Swift): Or could have made a mistake?

CM (Col XXXX): Anybody can make a mistake.

DC (LCDR Swift): So you are willing to listen --

CM (Col XXXX): Anybody can make a mistake.

DC (LCDR Swift): Thank you, sir. You know Colonel XXXX, you indicated that on your questionnaire; is that correct?

CM (Col XXXX): Yes, I did.

DC (LCDR Swift): How long have you known him?

CM (Col XXXX): Since April -- well, probably about April the 19th.

DC (LCDR Swift): Prior to coming down did you discuss with him you have been both assigned to this commission?

CM (Col XXXX): That we were both assigned, yes.

DC (LCDR Swift): When was that?

CM (Col XXXX): I think we were notified on June the 29th.

DC (LCDR Swift): Briefly, can you describe that discussion?

CM (Col XXXX): I received a phonecall from the commission that told me I was selected to do this. The person that called me said there was another Marine. I asked them if they were at liberty to say that. They said he was at the same base and told me it was Colonel XXXX. I don't know what day of the week that was, but the next time I saw Colonel XXXX, either he or I said I guess we are both on that commission.

DC (LCDR Swift): Did you have any discussion beyond that?

CM (Col XXXX): No.

DC (LCDR Swift): If both you and Colonel XXXX ultimately end up sitting on the commission, would you be more likely to give any weight to his arguments, or his opinions, over the other commission members because you know him?

CM (Col XXXX): No.

DC (LCDR Swift): Are you likely to give less argument or less weight to his arguments or opinions because you know him?

CM (Col XXXX): No.

DC (LCDR Swift): I notice also that you have been involved in military justice as a member before; correct?

CM (Col XXXX): Yes.

DC (LCDR Swift): You understand, obviously, that this is a completely different process than a court-martial?

CM (Col XXXX): Yes.

DC (LCDR Swift): And that as such there is no judge, in fact, you are one of the judges?

CM (Col XXXX): Yes.

DC (LCDR Swift): You also, I notice, administered nonjudicial punishment as a commanding officer?

CM (Col XXXX): Yes.

DC (LCDR Swift): You understand that the standard of proof here is much higher than at NJP?

CM (Col XXXX): Yes. The rules of evidence apply here and the elements of the charge, unlike NJP.

DC (LCDR Swift): Also I believe that NJP is a preponderance of the evidence where here it is beyond a reasonable doubt?

CM (Col XXXX): Right.

DC (LCDR Swift): I would correct one part, the rules of evidence are not exactly in play here, sir.

CM (Col XXXX): Right, but I mean like the elements of proof like in the court-martial that don't apply in an NJP.

DC (LCDR Swift): I understand. You indicated that you were a CO of several reserve Marines. Do I have that right?

CM (Col XXXX): Yes. In the Marine Corps the regimental commanders -- in the Marine Corps the regimental commanders of the reserve regiments are active duty. So I was the Commanding Officer of the XXXXth Marine Regiment, which is XXXX battalions of reserve Marines.

DC (LCDR Swift): And two of -- several of them were firefighters involved at the World Trade Center?

CM (Col XXXX): One of the battalions is a battalion in XXXX and many of the members of that battalion are firefighters and policemen in XXXX.

DC (LCDR Swift): And I believe one of them was unfortunately killed in your unit; is that correct?

CM (Col XXXX): Yes, one of the reserve Marines who was a firefighter was on duty on 9/11 and was killed.

DC (LCDR Swift): As CO did you go to his funeral?

CM (Col XXXX): Yes, I did.

DC (LCDR Swift): Did you meet with his family?

CM (Col XXXX): Yes, I did.

DC (LCDR Swift): What were your impressions?

CM (Col XXXX): Of what?

DC (LCDR Swift): During the course of that meeting did it affect you?

CM (Col XXXX): I have been a battalion commander. I have been a regimental commander. I have been in the Marine Corps 28 years. It is not the first Marine that, unfortunately, that I have seen die, whether he was on or off duty in the Marine Corps. The death of every Marine I have known or served with has a deep affect on me, but it is no different that that Marine's worth is no more or less than

the other Marines, unfortunately, that I have served with who have been killed.

DC (LCDR Swift): Did you go to the site, to the former site of the World Trade Centers as the CO with your people down there?

CM (Col XXXX): Yes, I did.

DC (LCDR Swift): When was that?

CM (Col XXXX): I don't know the exact date. I would estimate it was probably two weeks after the bombing.

DC (LCDR Swift): What affect, if any, did that have on you, personally? Describe how you felt?

CM (Col XXXX): It is a sad sight. A lot of destruction there. Hard to fathom what was there and what was left.

DC (LCDR Swift): Were you angry, sir?

CM (Col XXXX): I would imagine everybody that saw it was angry.

DC (LCDR Swift): Do you still think about it, sir?

CM (Col XXXX): That visit to there?

DC (LCDR Swift): Yes, sir.

CM (Col XXXX): No.

DC (LCDR Swift): You said that you have received multiple information briefs regarding al Qaida, Taliban, et cetera. Is anything in those briefs classified?

CM (Col XXXX): Yes.

DC (LCDR Swift): Well, obviously we shouldn't -- I do want to know more about the briefs that you received, but can you give me a general overview of the

briefings without going into the classified, or should we just wait for a closed session?

CM (Col XXXX): I can give you a general overview.

DC (LCDR Swift): Then if we could go to that. What types of briefings have you received regarding -- what types of briefings have you received regarding al Qaida, generally?

CM (Col XXXX): Mainly briefings about the organization, its history, origin, and their activities. And these were not specific briefings for me, but briefings that the staff received as part of weekly, or bi-weekly intelligence updates.

DC (LCDR Swift): Unless it's classified, who gave the briefings?

CM (Col XXXX): I don't know the Marine's names, but they are the Marines in the building from where I am from, the XXXX.

DC (LCDR Swift): I inartfully raised that question. I was more interested in the organization than the individual.

CM (Col XXXX): The organization?

DC (LCDR Swift): That gave the briefing?

CM (Col xxxxx): The XXXX

DC (LCDR Swift): Did anyone else give you briefings beyond the XXXX?

CM (Col XXXX): No.

DC (LCDR Swift): When did the briefings occur?

CM (Col XXXX): Well, let me back up. I am sure although I don't know who specifically gave them that I received briefings somewhere between January of 99 and July of 2000 at the XXXX Division at XXXX.

But the other briefings from the XXXX occurred between August of 2002 and probably for eight months off and on.

DC (LCDR Swift): Yes, sir. Without again, unless it is classified, let's talk about organization of al Qaida that you were briefed on. Were you -- in the organization were you shown how -- did this briefing explain how al Qaida had and currently functions?

CM (Col XXXX): These weren't detailed briefs specifically on that subject. These were intelligence updates, okay. Sometimes weekly, more often twice a month. So regardless of the subject there might have been three slides in that portion of the brief and the briefer might have said two or three sentences about that subject because these were update briefs.

DC (LCDR Swift): I understand.

CM (Col XXXX): So I am not sure I have the recollection to answer your question and be real sure of the answer.

DC (LCDR Swift): Well that in itself answered the question because the next one was anything in that brief had an impact on your ability to determine the facts in this case independent of what you have already been briefed on?

CM (Col XXXX): No.

DC (LCDR Swift): And I understand you really don't have a strong recollection of any particular detail?

CM (Col XXXX): No.

DC (LCDR Swift): I don't have any further questions at this time.

PO: Thank you. You may return to the deliberation

room. Please ask Colonel XXXX to come in.

There is some problems with joint procedures here. In the Army we don't stand when it is a single member coming in. You all can stand if you wish, but in the Army we don't do it. Please be seated.

Let the record reflect that Colonel XXXX has left the courtroom and Colonel XXXX has entered the courtroom.

Let the record reflect that I am handing Colonel XXXX a copy of his questionnaire in case you want to refer to it as discussed previously. Trial?

P (CDR XXXX): Thank you, sir. Good afternoon, Colonel XXXX.

CM (Col XXXXX): Good afternoon.

P (CDR XXXX): Sir, in reviewing your questionnaire, there appears to be a professional relationship between you and Colonel XXXX. Could you describe that?

CM (Col XXXX): I am the XXXX of the base and Colonel XXXX is the XXXXX of Marine Corps XXXX. The base is a subordinate command to the Marine Corps XXXX So one echelon level up, he is the XXXX of that organization.

P (CDR XXXX): Sir, based on that relationship there is no fitness report or rate of relationship involved?

CM (Col XXXX): With Colonel XXXX, no there is not.

P (CDR XXXX): Sir, anything involved with your relationship with Colonel XXXX that would cause you to not vote independently or decide issues on your own?

CM (Col XXXX): Not at all.

P (CDR XXXX): Sir, getting back to some of the issues that

got brought up when you were being questioned as a group, the defense counsel in one of their questions stated what they thought the sources of law were with respect to this commission. That is not something we want to argue right now, but it is a characterization that the prosecution disagreed with. Do you agree, as you were instructed before, that you're the determiner of the law and the fact involved in this case?

CM (Col XXXX): I believe that will be the case.

PO: Carry on.

P (CDR XXXX): Thank you, sir. Colonel XXXX, another thing brought up was the discussion of jurisdiction and the presiding officer defined what that was for you. The defense counsel portrayed the jurisdiction exists for violations of the law of war where it is the prosecution's contention that it also exists for other offenses triable by military commission. Do you agree that counsel will brief these issues and you will have to make a determination of what that law is?

CM (Col XXXX): Yes, I do.

P (CDR XXXX): Also during the group questioning, the defense counsel mentioned a civil suit initially filed in the State of Washington. Sir, do you agree that unless that civil suit has a bearing on an issue of fact or law, that you are required to deal with as the military commission member that suit does not impact our commission trial here?

CM (Col XXXX): I would agree with that.

P (CDR XXXX): Thank you, sir. Sir, getting back to your questionnaire, Questions 8 and 47, you stated that at one time you were responsible for coordinating movement of detainees. Could you elaborate on that, please?

CM (Col XXXX): Yes, my billet at time was the XXXX

and in that duty it was my responsibility to coordinate the logistics involved in moving detainees in from the theater to Guantanamo Bay.

P (CDR XXXX): Where were you physically located when you performed that duty?

CM (Col XXXX): In two different places. Most predominately it was in XXXX. Later we were moved forward to XXXX and that's where we operated out of.

P (CDR XXXX): Sir, were you in any way involved in making the determination of what detainees were eligible for transfer to Guantanamo?

CM (Col XXXX): No, I was not.

P (CDR XXXX): So your role was more logistical?

CM (Col XXXX): Logistical and -- yes, coordinate, to put all the pieces together to make it work.

P (CDR XXXX): Sir, in performing this role did you ever come across Mr. Hamdan's name or gain any familiarization with Mr. Hamdan?

CM (Col XXXX): Yes, but I wouldn't remember that name whatsoever.

PO: I am confused by that answer. Sitting here today, do you have an independent recollection of seeing the name Salim Ahmed Hamdan before?

CM (Col XXXX): No.

PO: Okay.

P (CDR XXXX): Thank you, sir.

PO: Did your answer mean that all of the names came across your desk at some time?

CM (Col XXXX): Yes.

PO: Thank you.

P (CDR XXXX): Colonel XXXX, do you understand that just because someone was transported to Guantanamo does not mean that they are guilty of an offense?

CM (Col XXXX): I do.

P (CDR XXXX): Sir, in Question 17, you stated that you thought the publicity associated with this case might impact your family. Do you have any specific concerns?

CM (Col XXXX): No, that's a general comment.

P (CDR XXXX): Will that in any way impact your ability to fairly sit as a member at this trial?

CM (Col XXXX): No, it will not.

P (CDR XXXX): In Question 19, you indicated that your position at XXXX might lead one to believe that you are biased in this matter. I will start simply; do you feel you are biased in this matter?

CM (Col XXXX): No, I do not.

P (CDR XXXX): Do you feel you can fairly try this case?

CM (Col XXXX): I do.

PO: I am just saying this so it won't look like I am whispering. Please everyone give a chance for a question to be translated and enough time for a response to be caught so that the translator can translate.

P (CDR XXXX): Thank you, sir. With respect to Question 41, you say you played a role in developing and executing war plans for Operation Enduring Freedom and Iraqi Freedom. Is there anything that you did

in that capacity that would interfere with you being a fair and impartial member?

CM (Col XXXX): I don't believe so.

P (CDR XXXX): You also stated on your questionnaire that -- and obviously from your position, you have had briefings concerning the al Qaida and Taliban organizations.

CM (Col XXXX): Yes.

P (CDR XXXX): Do you understand that those briefings are not evidence with respect to this commission.

CM (Col XXXX): I do.

P (CDR XXXX): And do you understand that whatever knowledge you gain from those briefings cannot generally be imparted to your fellow commission members?

CM (Col XXXX): I do.

P (CDR XXXX): Thank you, sir. I have no further questions.

PO: Defense?

DC (LCDR Swift): Yes, sir. Sir, as far as the questions on the law I think I after much stumbling, settled it down to a single question. Do you agree that you can't make up the crime -- that you can't make up the criminal statute after a crime has been committed and punish someone for it?

PO: Do you understand the question, colonel?

CM (Col XXXX): I am going to -- not entirely. I don't understand the question, sir. Say it again.

DC (LCDR Swift): Yes, sir. Do you agree that you cannot -- that you cannot -- that in our jurisprudence system you cannot write a criminal statute after an action has occurred and punish something that occurred before that criminal statute was established?

CM (Col XXXX): To restate it, do I believe that you cannot fabricate something to cover something that occurred in the past and use that against the accused?

PO: An accused.

CM (Col XXXX): An accused. Is that what you are asking me?

DC (LCDR Swift): When you say fabricate something, I mean create a criminal charge after the fact.

CM (Col XXXX): Yeah.

DC (LCDR Swift): Do you believe you can do that or not?

CM (Col XXXX): It does not make sense to me that you could do that. No, I don't think you could.

DC (LCDR Swift): Thank you. You indicated in your questionnaire that you spent a great deal of your time as an intelligence officer. Is that correct, sir?

CM (Col XXXX): That is incorrect.

DC (LCDR Swift): That's incorrect? I'm sorry. Is all of your answers regarding -- I just want to be sure here, sir -- Question 47 unclassified, sir?

CM (Col XXXX): You are asking me is that information classified?

DC (LCDR Swift): Yes, that is exactly what I am asking you, sir.

CM (Col XXXX): Okay. Everything we did at XXXX was classified at the secret level in general.

DC (LCDR Swift): Yes, sir.

PO: So there is no confusion, you are not saying that what you wrote in answer to Question 47 on the paper that your writing is classified, are you?

CM (Col XXXX): No.

PO: Thank you.

DC (LCDR Swift): Well, what I wanted to make sure was that I wasn't going to refer to anything in your writing that was classified. So, sir, certainly if you believe that at the time the question requires you to indicate classified, please let me know and we will stop.

CM (Col XXXX): Let me clarify if I may. The details of what is in this writing is clearly classified.

DC (LCDR Swift): Yes, sir.

PO: Details of what the writing refers to?

CM (Col XXXX): Yes.

PO: Thank you.

DC (LCDR Swift): You said you were involved in putting together a list of each detainee manifested and forwarding to OSD; is that correct?

CM (Col XXXX): That's correct.

DC (LCDR Swift): Did you simply assemble the list or did you have any evaluation in who should be on the list.

CM (Col XXXX): I assembled the list.

DC (LCDR Swift): And you did not evaluate any of the personnel whether they should or should not be on it?

CM (Col XXXX): No.

DC (LCDR Swift): Did you send other information along with the list of names, in other words, files or intelligence area that OSD would evaluate?

CM (Col XXXX): I did not. No, I didn't. Let me elaborate on that if I may.

DC (LCDR Swift): Yes, sir.

CM (Col XXXX): The list when I would get it would come with a series of names. My job was to ensure that it was in the proper format; then I handed that off to my boss, the XXXX, the XXXX officer. And who then would, I presume, take that to the commander and the combatant commander and ultimately that would go up through XXXX staff to OSD for approval.

DC (LCDR Swift): Did you -- were you involved after the preparation of the list with the transportation itself, after such people had been approved. Do you know who had been approved and who had not and make it happen?

CM (Col XXXX): Yes.

DC (LCDR Swift): Were you aware of what the OSD screening criteria were?

CM (Col XXXX): Yes, I was.

DC (LCDR Swift): I presume those are classified; is that correct, sir?

CM (Col XXXX): Yes, they are.

DC (LCDR Swift): We will ask about it in closed session. While you were with XXXX

CM (Col XXXX): XXXX?

DC (LCDR Swift): XXXX, I am sorry, sir. Where you -- did you receive intelligence briefings or were you aware of any interrogations or

interrogation techniques being utilized in Afghanistan or Guantanamo Bay?

CM (Col XXXX): Every day we received intelligence briefings. I was not privileged to any of the information that came out as a result of interrogations. And I was not involved in any of the activities that took place at Guantanamo Bay.

DC (LCDR Swift): Were you aware of the agencies that were participating in Guantanamo Bay?

CM (Col XXXX): No. And I only hesitate because I could only speculate who was here. And let me elaborate on that. I do know that we had established a XXXX. The components of that XXXX and its organization, I was not involved with.

DC (LCDR Swift): You indicated, sir, that you also helped draw out a plan for Operation Enduring Freedom; is that correct, sir?

CM (Col XXXX): I was involved primarily in the execution in my role. I was obviously surrounded with the preparations of and the planning effort.

DC (LCDR Swift): Were you aware -- at any time was there any position of discussing ROE or other parts as to whether the Geneva Convention was applicable to operation to Enduring Freedom.

CM (Col XXXX): Yes, sir. Yes, I was.

DC (LCDR Swift): Are those opinions or the discussions of it classified?

CM (Col XXXX): Yes, they are.

DC (LCDR Swift): We will discuss them in cross session, sir.

You have attended the War College, sir?

CM (Col XXXX): Yes, I did.

DC (LCDR Swift): You indicated that you received significant amount of training while at the War College on terrorism.

CM (Col XXXX): I don't know if I would use the term significant, but it was part of the curriculum. And to put it in perspective, I went to the War College prior to my XXXX assignment.

DC (LCDR Swift): Much of it, in other words, has sort of been overcome by events?

CM (Col XXXX): Exactly.

DC (LCDR Swift): Yes, sir. While there, did you read prior to -- while at the War College -- any books about al Qaida or Usama bin Laden?

CM (Col XXXX): No.

DC (LCDR Swift): While at the War College was it ever discussed in these terrorism classes that the operations that have gone on in the 90's amounted to a war or were actually ongoing conflict?

PO: What does that have to do with anything?

DC (LCDR Swift): It would be an opinion as to the law, sir. I just want to know if there were such discussions.

PO: Prior to being called here, had you sat down and tried to determine in your mind whether on your own or based on information that you got in briefings, the relevance of the law of war and other things to trying people for acts committed in Afghanistan or Iraq or anywhere else?

CM (Col XXXX): No.

DC (LCDR Swift): You mentioned that you received briefings almost daily while at XXXX. What portion of those briefings were regarding al Qaida operations in Afghanistan or other places? Unless that's

classified, sir.

CM (Col XXXX): No, that's not classified. But keep in mind that the focus at OEF, Afghanistan for sake of discussion, was at the tactical level primarily. And in OIF obviously focused on Iraq. That was focused on the Saddam regime and the components underneath him. So to answer your question more specifically, was it specifically oriented to al Qaida and what percentage of my time in those briefings were discussing al Qaida? The term itself was rarely used, frankly. The focus was on at the tactical level units and the enemy that was out in front of us.

DC (LCDR Swift): Is it fair to say, sir, that to really go beyond that because I do have some questions, I am going to start having to discuss classified questions?

CM (Col XXXX): Yes.

DC (LCDR Swift): Yes, sir, I will hold on. You indicated that you had friends in the Pentagon?

CM (Col XXXX): I did not indicate that.

DC (LCDR Swift): Sorry, sir. That is a note taking error on my part. I don't have any further questions, sir.

PO: Trial?

P (CDR XXXX): No, sir.

PO: Thank you, Colonel XXXX. You may return to the deliberations room.

How long is it going take -- you all can rise, but I am not going to tell you to rise.

How long is it going to take to have a recess? Everything being equal, the translators need a break. Can we have a recess for 15 minutes by any

wild chance? We can do it?

The counsel indicated.

The court is in recess.

The Commission Hearing recessed at 1410, 24 August 2004.

*The Commission Hearing was called to order at 1431,
24 August 2004.*

PO: Proceedings will come to order. Let the record reflect that all parties present when we left are once again present. Colonel XXXX is in the courtroom. The other members are not present. I am handing Colonel XXXX, his individual questionnaire for reference during the voir dire. Trial?

P (CDR XXXX): Thank you, sir. Good afternoon, Colonel XXXX.

CM (Col XXXX): Afternoon.

P (CDR XXXX): Sir, getting right to the questionnaire, in Question 15 you indicated that you thought the publicity associated with this case might impact your family. Do you have any specific concerns in that regard?

CM (Col XXXX): No, I don't have any specific concerns. I was a little concerned back in June when my name showed up in the newspaper about being a part of this commission. I was mostly concerned about the affect it would have on my family. However, given the reality that this was going to be in the papers and was going to have high publicity both in the United States and everywhere else, I recognized the fact that all of us in these proceedings are in a similar situation having to do with the publicity and having folks know who you are. Given that, I discussed it with my family and I only have general concerns for their safety; but either way it is not going to alter my ability to carry out my duties

here.

P (CDR XXXX): Thank you, sir. Sir, in response to Question 37 you stated that you knew a retired Colonel XXXX, who was a victim of the 9/11 attacks?

CM (Col XXXX): Correct.

P (CDR XXXX): Sir, what was your relationship with him?

CM (Col XXXX): I knew Colonel XXXX when I was a lieutenant colonel at XXXX Air Force base in XXXX. I was the executive officer for the three star commanding general there. In air force terms that is the administrative assistant, not the second in command like the other services. Colonel XXXX worked, also worked with General XXXX As General XXXX's executive officer I got to interface with Colonel XXXX maybe once, twice, three times a month doing paperwork things. And that relationship probably went on for a little over a year. I did not know his family. He did not know my family. I did not see him in social settings and we were professional acquaintances.

P (CDR XXXX): So is there anything involved in this professional acquaintance relationship that would impact your ability to fairly decide this case?

CM (Col XXXX): Not at all. I did not know he was a victim of the 9/11 attacks until about a month after them when I was speaking to some friends of ours who were also stationed at XXXX at that time.

(CDR XXXX): Now, sir, in Question 45 you wrote that you had read a book entitled a *Crisis of Islam*. Do you understand that whatever you read or remember from reading in that book is not evidence in this case?

CM (Col XXXX): Absolutely.

(CDR XXXX): And you will judge this case based on the evidence presented to the commission?

CM (Col XXXX): Yes, I will.

P (CDR XXXX): I want to touch on a few things that occurred when the group was being questioned. During that questioning the defense counsel stated to you the sources of law that he felt applied to this commission. He mentioned treaties, statutes, other things. Not getting into both sides of the argument on that issue, I think it was evident that we did not agree with his statement. Do you agree that you are the determiner as a commission member of the law, issues that will happen in this case?

CM (Col XXXX): As I understand the orders that have been given to us on this commission, we will both determine the law and the facts in this case. So yes, the answer is yes.

P (CDR XXXX): Also during that group questioning there was mention of jurisdiction which had been explained to you by the presiding officer. In that discussion the defense counsel stated that there was jurisdiction of law of war violations. Now, we will contend that there is also jurisdiction over crimes triable by military commission in accordance with the orders and instructions. Do you understand that this is potentially a point of issue and that you will receive briefing from counsel on such issues and you will be required to decide it?

CM (Col XXXX): I understand that defense and the prosecution have a difference of opinion as to what laws apply and how they apply, and that will be the commission's job to determine whether the motions that you set forth in front of us are valid or not and we will judge that.

P (CDR XXXX): Yes, sir. Sir, also brought up was a lawsuit brought by defense counsel in civilian court initially in the State of Washington. Do you understand that that is a separate and distinct proceeding, and that unless it impacts a question

of law or fact in this proceeding it has no impact on what we are doing here?

CM (Col XXX): I understand that.

P (CDR XXXX): I just want to clarify one particular phrase you used in filling out your questionnaire on Question 41. When discussing how 9/11 affected you, one of your comments was that we must stand tall. Could you please explain that to us.

CM (Col XXXX): I believe I also wrote and I can refer here that the threat of terrorism, in my opinion, is much like many of the other threats throughout the course of history of our country we have faced. I won't get into any specifics, but that threat much like the historical threats we have faced must be met with the same resolve as those previous threats to our country and that was my intention when I said we must stand tall.

P (CDR XXXX): When we apply things to the specifics of this particular accused and his right to a fair trial you see nothing in your background to impact your ability to serve on this commission?

CM (Col XXXX): Absolutely none.

P (CDR XXXX): Thank you very much, sir.

DC (LCDR Swift): I have only a few questions, sir.

PO: Pardon?

DC (LCDR Swift): I have only a few questions.

PO: Okay.

DC (LCDR Swift): I know that comes as a surprise, sir.

One -- before I begin, is anything in your questionnaire, just reviewing it again, classified in any way? I know you intended it not to be, but I don't want to refer to something classified.

CM (Col XXXX): There is nothing that I wrote in there that is classified.

DC (LCDR Swift): You were involved with the Predator Missiles Program; is that correct, sir.

CM (Col XXXX): Yes. You are making a slight mistake in terminology there. Predator is an unmanned aerial vehicle.

DC (LCDR Swift): Yes, sir.

CM (Col XXXX): The missile you are referring to is the Hell Fire Missile.

DC (LCDR Swift): Yes, sir.

CM (Col XXXX): And, yes, I was involved in this program.

PO: Which program? I am sorry.

CM (Col XXXX): The program to arm the Predator UAV with the Hell Fire Missile.

PO: Thank you.

CM (Col XXXX): I was the XXXX of the organization that was charged with doing that.

DC (LCDR Swift): Yes, sir. In the course of doing that did you have any operations or was a Predator -- a Predator was used to fire a Hell Fire Missile in Yemen, that is a documented fact. Were you in anyway involved in that operation, sir?

CM (Col XXXX): I was in no way involved in operations of that mission. My job at the time was to be a force provider, to provide missiles, Predator UAVs, and people to operate them to other government agencies. And I had no knowledge of the tactical or mission details, really just to provide to the forces, sir.

DC (LCDR Swift): I have no other questions at this point.

PO: Thank you. Any other follow?

Sir, could you return to the deliberation room and please ask Colonel XXXX to come in.

CM (Col XXXX): I will.

PO: Thank you. Let the record reflect that Colonel XXXX has left the courtroom and that Lieutenant Colonel XXXX has entered it, and that I have handed him his questionnaire.

Trial?

P (CDR XXXX): Thank you, sir. Good afternoon, Lieutenant Colonel XXXX.

CM (LtCol XXXX): Good afternoon.

P (CDR XXXX): Lieutenant Colonel XXXX, you previously expressed that you were involved in the capture of enemy personnel in both Iraq and Afghanistan?

CM (LtCol XXXX): That's correct.

P (CDR XXXX): Obviously, I don't want us to get into classified information, but could you generally describe what your role, or what your duties were.

CM (LtCol XXXX): Yes, I am an intelligence officer by trade and I am assigned to a XXXX deployed for both XXXX and XXXX with the mission of all the forces deployed in the area to capture enemy personnel.

P (CDR XXXX): Were you ever specifically involved with or provided information concerning the capture of the accused?

CM (LtCol XXXX): No, I was not.

P (CDR XXXX): Do you have any knowledge concerning the

circumstances of the accused's capture?

CM (LtCol XXXX): No, I do not.

P (CDR XXXX): Do you have any information concerning his detention after being captured?

CM (LtCol XXXX): No, I do not.

P (CDR XXXX): Now, as an intelligence officer have you ever received specialized training on the al Qaida organization or the Taliban?

CM (LtCol XXXX): Specialized training, no I have not.

P (CDR XXXX): Is there anything involved in training you received or your exposure as an intelligence officer that you feel would impact your ability to fairly try this case?

CM (LtCol XXXX): No, there is not.

P (CDR XXXX): Just want to touch on a couple of things raised when the entire group was being questioned. During defense counsel's questioning he stated what he felt the sources of law were applicable to this case. It was probably evident that the prosecution did not feel the same way on that issue. Do you understand that as a commission member it is for you to determine what the applicable law is with respect to this case?

CM (LtCol XXXX): Yes, I do.

P (CDR XXXX): Also in the defense counsel's questioning there was discussion of jurisdiction and the presiding officer assisted in defining what jurisdiction was. The defense counsel mentioned violations of the law of war in order to determine jurisdiction, and have jurisdiction, where the prosecution would also contend that offenses triable by military commission also generate jurisdiction. This is obviously a tough time for those terms but the point I am getting at is do you

understand that you will get briefed on those issues by both sides and you will have to make a determination?

CM (LtCol XXXX): Yes, I do.

P (CDR XXXX): Also mentioned during the group questioning was defense counsel filing a lawsuit at least then in the State of Washington.

Do you understand that that lawsuit is separate and distinct from this commission?

CM (LtCol XXXX): Yes, I do.

P (CDR XXXX): And do you understand that unless a question of fact or a law question comes up in this commission that makes that lawsuit relevant these are two separate entities, if you will?

CM (LtCol XXXX): Yes, I do.

P (CDR XXXX): Thank you, very much.

PO: Commander Swift?

DC (LCDR Swift): Yes, sir. Good afternoon, Colonel.

CM (LtCol XXXX): Good afternoon.

DC (LCDR Swift): Let me begin with the same warning, or caveat, that Colonel XXXX used, please in my questions if I even tread towards classified information alert me.

Were you ever physically located in Afghanistan in these duties?

CM (LtCol XXXX): Yes, I was.

DC (LCDR Swift): During what periods of time?

CM (LtCol XXXX): Multiple times between the middle of XXXX through the middle of XXXX.

DC (LCDR Swift): And you worked with which organizations?

CM (LtCol XXXX): A XXXX.

DC (LCDR Swift): What was your role inside that task force?

CM (LtCol XXXX): I was a XXXX.

DC (LCDR Swift): Were you one of the officers or the officer in charge?

CM (LtCol XXXX): I was XXXX when we went forward?

DC (LCDR Swift): Yes.

CM (LtCol XXXX): At times I was the officer in charge of the XXXX portion.

DC (LCDR Swift): The XXXX, yes, sir. Will it require you to go into classified information to talk about who you provided intelligence to?

CM (LtCol XXXX): Yes, it would.

DC (LCDR Swift): We will save that. In order to provide this intelligence -- well, will it require you to go into classified information to tell me any of the sources of the intelligence you used?

CM (LtCol XXXX): Yes.

DC (LCDR Swift): You stated earlier that you do not know or did not know Salim Ahmed Hamdan?

CM (LtCol XXXX): Yes, sir.

DC (LCDR Swift): In your experience there were people who were being referred to by their full names who were being detained?

CM (LtCol XXXX): Yes, yes, sir, they were.

DC (LCDR Swift): Were all those names correct at the time that they were being referred to?

CM (LtCol XXXX): To the best of my knowledge.

DC (LCDR Swift): Is it possible that you would have seen intelligence on him and simply not remember it, or know it at this time?

CM (LtCol XXXX): Yes, it is possible.

DC (LCDR Swift): Probably, again, to get into more of the type of intelligence we would have to go into classified information?

CM (LtCol XXXX): That's correct?

DC (LCDR Swift): Yes, sir. As an intelligence officer are you more likely to put stock in an intelligence report having experience in how they are developed?

CM (LtCol XXXX): As opposed to?

DC (LCDR Swift): As opposed to other evidence?

CM (LtCol XXXX): I would weigh the evidence that is put before me. If you are saying the intelligence would be the evidence?

DC (LCDR Swift): Did you believe that the intelligence that you were obtaining in Afghanistan was accurate?

CM (LtCol XXXX): At times yes, at times not.

DC (LCDR Swift): To be more specific, does it require you to go into classified information?

CM (LtCol XXXX): I am not sure. It will depend on the question itself.

DC (LCDR Swift): Okay. I will try another couple then. When you say at times not, can you elaborate on those occasions when it wasn't accurate?

CM (LtCol XXXX): It might be best if we just do that in closed session.

DC (LCDR Swift): Yes, sir. You indicated that you did self-study on al Qaida, can you describe that?

CM (LtCol XXXX): As an intelligence officer of course we are reviewing the information that is coming in, the intelligence reports, and that's what I refer to as self-study.

DC (LCDR Swift): So you are basing that primarily on the intelligence reports that you received?

CM (LtCol XXXX): Correct.

DC (LCDR Swift): You didn't do additional study by reading books?

CM (LtCol XXXX): Yes.

DC (LCDR Swift): Is that the same as Taliban and Islamic fundamentalism?

CM (LtCol XXXX): Correct.

DC (LCDR Swift): You indicated that you've seen some media coverage on military commission proceedings. Can you elaborate?

CM (LtCol XXXX): Just that they were forming the commissions in Guantanamo Bay and it would be the first time since World War II.

DC (LCDR Swift): Do you remember where you received that from?

CM (LtCol XXXX): CNN and Fox most likely.

DC (LCDR Swift): As an intelligence officer when you prepared briefs -- and you prepared briefs for use by operators; is that correct, sir?

CM (LtCol XXXX): Yes, I have.

DC (LCDR Swift): You have during your career?

CM (LtCol XXXX): Yes.

DC (LCDR Swift): You are required to put faith in the sources and material that's being provided to you; is that correct, sir?

CM (LtCol XXXX): That's correct -- well, and you have to weigh the evidence.

DC (LCDR Swift): Are you more -- because of your experience is it fair to say that you are more inclined toward believing an intelligence brief that's been put together by a competent intelligence officer?

CM (LtCol XXXX): Just depends on the information.

DC (LCDR Swift): In addition to your tour in Afghanistan, have you had any other support or operational roles in Operation Enduring Freedom?

CM (LtCol XXXX): Enduring Freedom, I was liaison officer to XXXX in XXXX for a period of two, two and a half months.

DC (LCDR Swift): Were you -- without again -- if it requires us go into classified let me know. What exactly did you do as that liaison officer?

CM (LtCol XXXX): We would have to discuss that elsewhere.

DC (LCDR Swift): Classified information, okay.

The rest of my questions are going to go into the same area and we will need to do this in closed session.

P (CDR XXXX): Nothing additional, sir.

PO: Sir, would you please return to the deliberation room and ask Colonel XXXX to come in.

Let the record reflect that Colonel XXXX has entered the courtroom and Colonel XXXX has left the courtroom. I have provided Colonel XXXX with a copy of his questionnaire. Trial?

P (CDR XXXX): Thank you, sir. Good afternoon, Lieutenant Colonel XXXX.

CM (LtCol XXXX): Good afternoon.

P (CDR XXXX): I would like to address your questionnaire. Particularly, I want to focus on Questions 15 through 18. You expressed concern about the safety for your family as a result of your service on this commission. Are there any specific concerns that you have?

CM (LtCol XXXX): No, there are no specifics. It is all generalized comments about the concern and safety of my family.

P (CDR XXXX): Do you feel that you can, as hard as it may be, put aside those concerns and give this commission your undivided attention and provide the fair trial if called upon to do so?

CM (LtCol XXXX): If called upon to do so, yes, sir, I can.

P (CDR XXXX): And for purposes of my questioning, I understand you are an alternate at this point, but I will couch my questions as if you are selected to sit.

CM (LtCol XXXX): Understood.

P (CDR XXXX): As a voting member, you put in your questionnaire that the events of 9/11 in general aroused strong emotions as they have in most Americans. Do any of those emotions impact your ability to judge this particular accused?

CM (LtCol XXXX): No, sir, they do not.

P (CDR XXXX): Would you agree that any emotional response should not sway your judgment in assessing the facts and law in this case?

CM (LtCol XXXX): Very much so, sir, they must stay out.

P (CDR XXXX): On your questionnaire you put that, as of right now, you don't feel influenced by the high media interest in this case, but that possibly you might. Could you explain to us what you foresee might occur in the future?

CM (LtCol XXXX): What I believe is that possibly if it comes very high media and attention that they will find out that where I live, things like that. And the press will be bothering my family, my myself when we are not in these proceedings and that is how I see the media could possibly affect me.

P (CDR XXXX): Will you be able to set aside that concern and conduct business and provide a fair trial while in this courtroom?

CM (LtCol XXXX): Yes, sir, I can.

P (CDR XXXX): You also put in your questionnaire that you desire to seek justice for those who have perished at the hands of terrorists.

CM (LtCol XXXX): That is part of the emotional response that I had. That probably goes with how I feel, strong emotionally towards this case. Understanding that what I said in my prior answer that I will take the emotion out of that, but I want to be forthright in my questionnaire in how I responded.

P (CDR XXXX): And in seeking justice, do you understand that involved in seeking justice is ensuring a fair trial and holding us to our obligation to prove this case beyond a reasonable doubt?

CM (LtCol XXXX): That is exactly part of my answer, sir.

I think that it is on both sides that this must have an end state at some point in time and I think justice has to be served for all individuals involved.

P (CDR XXXX): On your questionnaire in Question 45, you indicated you have read media reports about conditions of detention in Afghanistan and Guantanamo. Roughly, how many articles have you seen on this subject?

CM (LtCol XXXX): I would probably say two to three, sir.

P (CDR XXXX): Did you come across them just as the normal reading of the paper or watching TV or did you specifically seek them out?

CM (LtCol XXXX): No, I came across them just by strictly accident, sir.

P (CDR XXXX): Have you ever personally visited any of the detention facilities in Afghanistan or here at GTMO?

CM (LtCol XXXX): No, sir, I have not.

P (CDR XXXX): Do you have any way as you sit here right now to judge the accuracy of these articles that you may have read?

CM (LtCol XXXX): No. I have no basis for the judge of those articles, sir.

P (CDR XXXX): And you understand that your basis to judge these type of items is based on what you will see presented before this commission?

CM (LtCol XXXX): That is correct, I understand that.

PO: Could counsel and Colonel XXXX please let a little time elapse between questions and answers, please?

P (CDR XXXX): Yes, sir. In looking at Question 47, you say

that at least at some point you express an opinion that at least some detainees at Guantanamo Bay are terrorists. Do you recall when or the context of expressing that opinion?

CM (LtCol XXXX): No, I do not recall the premise of that. I think the most influential piece I saw was from 20/20, but I may not be right about that.

P (CDR XXXX): Is that what the opinion was based on a 20/20 --

CM (LtCol XXXX): Yes, and that opinion at the time.

P (CDR XXXX): When you made that statement were you referring to any particular detainee?

CM (LtCol XXXX): No, sir. That was just a general statement.

P (CDR XXXX): So that had nothing to do with the status of this particular accused?

CM (LtCol XXXX): No, sir.

P (CDR XXXX): No further questions, sir.

DC (LCDR Swift): I must confess, Colonel, on Question 18 I really didn't understand your answer. So, I am going to ask the question again. Do you believe that your participation in these proceedings will have any effect on you? Any affect on how you are viewed or perceived either in your personal or professional life?

CM (LtCol XXXX): What that means is if -- I will try to slow down some.

DC (LCDR Swift): Thank you, sir.

CM (LtCol XXXX): What I meant by that is it comes out as a negative reaction in the United States, knowing that I was part of these commissions. I may be perceived negatively also based on the way the

question was worded to me at the time.

DC (LCDR Swift): Let get more specific then. What would a negative reaction be in the United States? Can use -- is that to a finding of not guilty, a negative, or angry reaction or to the proceedings themselves?

CM (LtCol XXXX): To the proceedings themselves, more in general to me.

DC (LCDR Swift): Are you concerned at all professionally about how being a member of this panel can affect you?

CM (LtCol XXXX): No, sir, I do not.

DC (LCDR Swift): In Question 41, you did answer to the events of 9/11 has made you very angry. And it is important that we be forthright and I certainly understand that you will do your absolute best to divorce emotion, but you do have strong emotions, don't you?

CM (LtCol XXXX): Yes, I do have strong emotions, sir.

DC (LCDR Swift): You indicated that you knew you had professional friends in the Pentagon and you wrote down two names and I don't think it is relevant to put their names. Were they killed, injured, or were just there?

CM (LtCol XXXX): They were just there, sir.

DC (LCDR Swift): Did you talk to them about what happened?

CM (LtCol XXXX): No, I had never talked to either one of those about that.

DC (LCDR Swift): You indicated in Question 42 that you believed that if your identity or membership in this commission is exposed or broadcast to the public that you believe that they will seek me out, seek me and my family out for revenge. First of

all, who is they?

CM (LtCol XXXX): Terrorist organizations, sir.

DC (LCDR Swift): Do you believe they will do that whether you find Mr. Hamdan guilty or not guilty. Does it matter what you find if you participate?

CM (LtCol XXXX): I think my participation alone would be the reason, sir.

DC (LCDR Swift): Is this a strong feeling or -- well you stated it as a strong feeling. Do you still stand by that?

CM (LtCol XXXX): Yes, it is a strong apprehension to better describe it for you, sir.

DC (LCDR Swift): You indicated on Question 44 that you have done self-study regarding al Qaida on the Internet. Can you briefly describe what sites you have gone to and how much time you have spent on them.

CM (LtCol XXXX): Numerous sites I have gone to, whatever I could find on the search. The Class of -- was probably the best book I have read. I just wanted to understand.

PO: I state for the record, once again, that when I make motions towards counsel or a member I am not doing anything other than trying to keep them to speak slowly so that the translators can translate. I apologize for interrupting.

CM (LtCol XXXX): I'm sorry. I'll slow down. Sir, to get back to your question I want to understand both sides how Islamic, also United States, also the Taliban what their values were, what they wanted, their goals, things like this. I wanted an understanding. I think I can better my life, know the reasons of the things that have happened.

DC (LCDR Swift): How much time did you spend on that?

CM (LtCol XXXX): That is difficult to say. I wouldn't say I was obsessed, but I have probably spent probably a month's of research.

DC (LCDR Swift): A month?

CM (LtCol XXXX): Yes. And that's over four to five years.

DC (LCDR Swift): Over four to five years. So you began this study before 9/11?

CM (LtCol XXXX): No, sir. Only the book *Class of* -- was before.

DC (LCDR Swift): In Islamic fundamentalism you indicated self-study, but you also indicated S-2 briefings, were those classified?

CM (LtCol XXXX): Yes, sir, they were.

DC (LCDR Swift): Then we will discuss those briefings in closed session.

CM (LtCol XXXX): Yes, sir.

DC (LCDR Swift): You also indicated that you had seen news media on the military commissions. Do you recall what the sources of that media was? Was it paper or was it television broadcasts?

CM (LtCol XXXX): It was on the internet. Every morning I would check the internet and it would say the military commissions were forming and that is all I saw on that.

DC (LCDR Swift): Do you -- well the Department of Defense has several websites, do you use them?

CM (LtCol XXXX): No, sir, I did not.

DC (LCDR Swift): They also have the early bird. Is that where you saw these?

CM (LtCol XXXX): Yes, sir, that is where I saw those.

DC (LCDR Swift): And so did you go ahead and click on the article and read the entire article or just read the banner so to speak?

CM (LtCol XXXX): I would click on the article. I probably would read a few lines that interest me in the beginning and then delete it. I think there was only one article that I ever read.

DC (LCDR Swift): Now, you realize that you met me at the time that you filled this questionnaire out. Do you recall whether I happened to be in that article? I was in several.

CM (LtCol XXXX): No, I do not remember your name until today, sir.

DC (LCDR Swift): Now, on your opinion in 47 you indicated that, yes, you believed that the persons in Guantanamo Bay were terrorists; is that correct?

CM (LtCol XXXX): At one time, yes, because it asked if I ever expressed an opinion.

DC (LCDR Swift): But you don't recall who you expressed it to?

CM (LtCol XXXX): No, I do not, sir. And like I said before, sir, it was a very general statement and a general conversation.

DC (LCDR Swift): Then you answered B and said that detainees at Guantanamo are guilty of any criminal offense and you answered that, no.

CM (LtCol XXXX): Right. As we go to the underlying question, have I ever expressed an opinion and it is like when I got to whether the detainee was guilty of any criminal charges, what I was trying to say is I don't know. So I said no. I didn't express the opinion either way.

DC (LCDR Swift): I understand. You don't associate then a terrorist and a criminal?

CM (LtCol XXXX): That's what I am saying, sir.

DC (LCDR Swift): So you saw those to be two separate things?

CM (LtCol XXXX): That's correct. I take the word guilty as a due process, sir, someone who would have to go through a due process and then a determination of guilty or not guilty, sir.

DC (LCDR Swift): Was the 20/20 special that you watched critical of Guantanamo Bay or generally supportive of it; or was it simply information?

CM (LtCol XXXX): It was more information.

DC (LCDR Swift): How did you feel when you watched it?

CM (LtCol XXXX): How did I feel? I feel that -- I felt it was -- it is like it has been a long time. That's what I remember, it has been a long time that they have been down here and so when is this due process going to happen. I remember that.

DC (LCDR Swift): You answered 52, which basically was you believed members of the United States are obligated to abide by the Geneva Convention during armed conflict. You indicated that you're not sure about that.

CM (LtCol XXXX): It was a question at the time that I was not sure about, at least not quite sure.

DC (LCDR Swift): Okay. Do you know what the Geneva Convention is then?

CM (LtCol XXXX): Not specifically, no. That's being honest and I wanted to review it before I could formulate an opinion before that question, sir. What I was trying to do was, I know it is very specific and there is three different articles, I

wanted to put not sure because I couldn't specifically say yes and formulate an opinion and give a full answer to that question.

DC (LCDR Swift): Actually there are four articles, sir, but that's fine. Is it fair to say that you would be willing to listen to both counsel's arguments regarding its application to these proceedings?

CM (LtCol XXXX): Yes, sir.

DC (LCDR Swift): I don't have any further questions.

PO: Trial?

DC (LCDR Swift): In open session, sir.

P (CDR XXXX): Nothing further, sir.

PO: Thank you, Colonel XXXX. If you will return to the deliberation room.

CM (LtCol XXXX): Yes, sir.

PO: Let the record reflect that Colonel XXXX has left the deliberation room. Okay, who do you want back for classified, trial? Closed, excuse me -- I apologize, for closed. No one?

P (CDR XXXX): No one, sir.

PO: Okay.

DC (LCDR Swift): I need a moment to consult.

PO: That's fine.

DC (LCDR Swift): In reviewing my notes, I believe all of the members indicated at least one area that required classified information, sir.

PO: Realizing that I can't hold you to this and you can't -- it is hard for you. How long do you think your combined questioning will take? I mean

seriously, thirty minutes?

DC (LCDR Swift): I doubt that seriously, sir.

PO: An hour?

DC (LCDR Swift): For each one or --

PO: No, for all five of them.

DC (LCDR Swift): For all five of them, sir?

PO: Yeah?

DC (LCDR Swift): Given two of the members had extensive contacts in Afghanistan and in intelligence gathering and detainee operations, I would assume that those would go for some time. I have no way of knowing because of course I haven't been provided any classified information regarding that. So it is impossible to estimate, sir. The rest of them, they are going to be fairly short. Those -- but specifically Colonel --

PO: Okay. That's all right.

DC (LCDR Swift): Colonel ~~XXXX~~ and --

PO: For those who are interested, I do not anticipate holding the next open session until 1730.

DC (LCDR Swift): Yes, sir. I would like to enter argument and make a request regarding whether my client will be present. I understand the rest of the public will not, but I would like to talk about my client being present for the next session.

PO: Okay. Go on?

DC (LCDR Swift): I understand under the security policy that one must go to the originating authority to classify the material to determine whether it be released to my client. I request that a summation be prepared of each of these persons where they

believe they are going to talk and that we go to such a classifying authority to see if my client will be present. Nothing is more fundamental in my client's faith in the process -- in fact faith in the process that believes that he has full and fair members who are able to hear his case without any other prejudice to exclude him at that point without even trying to include him is not in keeping with the full and fair trial as dictated by the President, sir.

P (CDR XXXX): Yes, sir. Lieutenant Commander Swift himself had said repeatedly he is going to get into classified information. This is a nondiscretionary call. We are going to talk about classified information and the accused does not have the clearance to be exposed to that information. Now, it is true that potentially when we are done this information can be reviewed and summaries, redacted portions can be provided; but as of right now to ask someone to make a call that we can expose the accused to this information without knowing what the information is, that's just not feasible, sir.

PO: Your request is denied, Commander Swift. How long is that going to take you to be ready to start the closed session, clear the courtroom, and do the things?

P (CDR XXXX): Twenty minutes, sir.

PO: We will start at 1535. The court is in recess.

The Commission Hearing recessed at 1524, 24 August 2004.

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. SALIM AHMED HAMDAN

a/k/a Salim Ahmad Hamdan

a/k/a Salem Ahmed Salem Hamdan

a/k/a Saqr al Jadawy

a/k/a Saqr al Jaddawi

a/k/a Khalid bin Abdallah

a/k/a Khalid wl'd Abdallah

This is to certify that Pages _____ through _____ are an accurate and verbatim transcript of the foregoing proceedings.

Peter E. Brownback III
Colonel, U.S. Army
Presiding Officer

Date

THE NEXT SESSION WAS A CLOSED SESSION AND SEALED WITH A CLASSIFICATION OF **S E C R E T**. THIS SESSION CONSISTS OF PAGES 84 TO 110 AND CONTAINS THE INDIVIDUAL VOIR DIRE OF COMMISSION MEMBERS: COLONEL XXXX, COLONEL XXXX, LIEUTENANT COLONEL XXXX, AND LIEUTENANT COLONEL XXXX.

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. SALIM AHMED HAMDAN
a/k/a Salim Ahmad Hamdan
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a/k/a Khalid bin Abdallah
a/k/a Khalid wl'd Abdallah

This is to certify that Pages _____ through _____ are an accurate and verbatim transcript of the foregoing proceedings.

Peter E. Brownback III
Colonel, U.S. Army
Presiding Officer

Date

The Commission Hearing opened at 1733, 24 August 2004.

PO: Be seated. Let the record reflect that all parties present when the court recessed are again present. The members other than myself are not present. The proceedings from the time I walked in are no longer under seal.

During the closed the session, I received challenges for cause. One against Colonel XXXX for his role of transportation of detainees from the area of operations to Guantanamo Bay. Trial, right?

P (CDR XXXX): Yes, sir.

PO: Defense?

DC (LCDR Swift): That's correct, sir.

PO: I received a second -- another challenge for cause against Lieutenant Colonel XXXX for his role as an intelligence officer on the ground in Afghanistan from approximately XXXX of 2001 until XXXX of 2002; is that correct?

P (CDR XXXX): Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: Okay. Trial, challenges?

P (CDR XXXX): We have no challenges, sir.

PO: Okay. Defense?

DC (LCDR Swift): We have four challenges, sir.

PO: Okay.

CC: I am going to start based on the open session challenges, Colonel XXXX and Colonel XXXX.

PO: Okay. The only challenges -- I have already

covered all the closed session challenges.

DC (LCDR Swift): Yes, sir.

PO: Okay. Good.

DC (LCDR Swift): Colonel XXXX, as you just indicated, I previously entered a challenge regarding the information in the closed session. In the open session I'd like to challenge Colonel XXXX based on good cause on appearance, that is Military Commission Instruction Number 8 permits the removal of members for good cause. Good cause can be the members inability to sit, that we discussed earlier, and the appearance of unfairness of a member's ability to sit.

It's the defense's position that Colonel XXXX placed on this panel as a person who XXXX detainee movement does not give the appearance of fairness to this proceeding; that Colonel XXXX, whatever his good intentions and his abilities as an officer, and his desire to follow the law, and to be fair in the proceedings played someone who was intimately involved in detainee operations or moving persons onto this panel does not pass an appearance test. It does not give confidence to the accused, and it does not give confidence to the public at large that this proceeding will be fair.

Likewise, Lieutenant Colonel XXXX plays an intelligence officer who was actually working -- served in Afghanistan during the period of time Mr. Hamdan was captured and held. It does not give the appearance of fairness for the proceedings. Again, that constitutes good cause shown. It's important that these proceedings not only be fair but they appear fair to the world, and the continuation of both of these members does not meet that test.

As to Colonel XXXX, Colonel XXXX -- we also challenge Colonel XXXX. Colonel XXXX visited the Trade Center -- weeks after the attack. Records document the state that it was in. Persons

that he had in command responsibility were involved in the rescue effort and were -- he went to the funeral. If we move to sentencing -- that is an important, if -- we fully expect the prosecution to put on evidence of the impact on victims. That impact will be particular for Colonel XXXX because he has personal experience with those victims. It won't be a detached evaluation for him. It will be the memories of 9/11. It will be memories of the funeral that he attended. While I am sure that he intends good intent to keep an open mind, to try and consider all ranges, this experience makes him unsuitable for this panel.

Finally, we challenge Lieutenant Colonel XXXX. Lieutenant Colonel XXXX very candidly said that he has very strong emotions, that he is very angry. He did say that he understood that he should accept those emotions, but when asked again he said, yes, I have very strong emotions. Also, Colonel XXXX has indicated that he has a real and present apprehension that he will be harmed, or his family will be harmed by his participation. He certainly said, I know my duty. I'm a soldier, I should do my duty. But with that type of apprehension sitting, with his very strong feelings, both in the merits and at sentencing, he's not an appropriate person to sit on this panel. And, again, we believe that good cause exists for his removal based on his strong personal beliefs, and a real apprehension, not a speculative one, a real apprehension that he has in his participation.

Thank you. Well, I'll address it at the end of it. I am sure that Commander XXXX has rebuttal.

PO: Go on, Commander XXXX.

P (CDR XXXX): Thank you, sir. Sir, the prosecution will address these in order of rank and seniority. We will begin with Colonel XXXX.

It appears the only issue the defense has with Colonel XXXX is his interaction with a XXXX

XXXX who was --. A reality of military life, a reality of being a Marine is that in the course of his 28 years, he has known of his fellow Marines to pass away. He told us all that this is something he is accustomed to, that he may not get used to it, but that he is treating this death no different than the deaths of those other Marines who have perished. He stated he has no individual knowledge of this accused. He stated that he will judge this case based on the evidence presented in this courtroom. We oppose the defense's challenge for cause.

With respect to Colonel XXXX, Colonel XXXX handled logistics. His job was when he was told what detainees were to be moved, his job was to get them from Afghanistan to Guantanamo Bay. It was not his job to determine who met the screening criteria for movement. Those decisions were made elsewhere, and he was not in a position to question those decisions. In his limited capacity of being a logistics planner, he had no knowledge of this accused; he had no knowledge of this accused's transfer; he had no knowledge of the facts surrounding this accused's capture. Once this accused arrives at Guantanamo, Colonel XXXX's job is over. He has no interaction with what is going on in Guantanamo. While he knows that a joint task force is established in Guantanamo, he is not even aware of the units that make up that joint task force. We oppose the defense challenge to Colonel XXXX.

With respect to Lieutenant Colonel XXXX, while he was an intelligence officer in Afghanistan for the very limited period of three months, he has no knowledge of this accused, he has no knowledge of how he was captured, and he has agreed to judge this case based on the evidence that's been presented. There's simply no basis to challenge Lieutenant Colonel XXXX.

With respect to Lieutenant Colonel XXXX, he was

obviously deeply impacted by the events of 9/11, as many Americans were. This is not necessarily an unreasonable reaction to what occurred that would require his disqualification.

Thank you, sir.

DC (LCDR Swift): To address, briefly, in counter, Commander XXXX did not address in either of his arguments what I addressed here, and that is the appearance. Nothing that he said took away any of the appearance of any military tribunal -- especially both forms of justice are concerned both when -- are they administering justice and does it appear that they are administering -- appear that they are meting out, administering justice.

At a military commission one has to be particularly careful that what you're meting out is not victor's justice. By placing an intelligence officer, by placing a person who was in charge of the detainees, by placing a person who had close relationship with a victim, who went to the funeral, went to the site, and placing someone who to this day says that he is very angry and has a real apprehension on this panel, we appear to be meting out victor's justice. Thank you, sir.

PO: Okay. Yes, go on.

DC (LCDR Swift): I would also like to be heard on the question of abeyance after you've --

PO: Okay. I've considered your challenges, and I am going to forward a transcript of the voir dire, the members questionnaires for Colonels XXXX & XXXX, and Lieutenant Colonels XXXX to Mr. Altenburg, the appointing authority, for his action. I offer counsel for both sides, since you're apparently using a different standard for challenge, referring perhaps to the military justice standard under RCM 912(N), an opportunity to send up with that matter any other matters you want; specifically, if you

wish to focus on what the standard for challenge should be. Today is the whatever it is -- the 24th. By Tuesday, the 7th, provide opposing counsel anything you want to send so they can comment on it and then get it to me by -- would the 10th give you enough time?

P (CDR XXXX): Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: Give it to me by the 10th and I will -- we got to get the record transcribed and all that anyway. I will get it to Mr. Altenburg to see what he wants to do.

Okay. Now, I have the authority to either abate or not abate, and you want to be heard, Commander Swift?

DC (LCDR Swift): Yes, I do, sir. Sir, I've entered challenges for cause on five members at this point, including yourself. It's our position that to go further with motions with so many challenges where an alternate could not even sit in, if more than two are granted, that we would need to bring in more members.

PO: If more than two are granted? If three are granted.

DC (LCDR Swift): Yes, sir.

PO: If three are granted we have three members left; right?

DC (LCDR Swift): Yes, sir.

PO: That is all we need; right?

DC (LCDR Swift): Yes, sir. Excuse me, if four of those --

PO: Okay. We've got five challenges, and you want an 80 percent success rate?

DC (LCDR Swift): Well, in this sense, and I would point out, sir, what you're saying is that in the consideration of this, in the consideration of the motions, you're going to have necessary discussion by members, and input, notes, hearing all of that will involve persons who may not be here when all of the challenges are done again. Gestured that we have another motion to date following the continuance, that we go through arraignment at this point and enter pleas, but that motions be deferred after that point when we have an answer on these continuances -- or, excuse me, on these challenges.

P (CDR XXXX): Sir, first off, to state the obvious, we do not believe that the defense will be successful in their challenges. Even if they meet a moderate amount of success, it will not impact our ability to have a quorum and go forward. Even if they had the potential success that they may be banking on, there are mechanisms within the system to take care of that if so required. Other new members can be brought up to speed, and that's in our system.

PO: Okay. My question though is, what does it hurt you? Okay. Before we get to the question of abeyance, which I'm sure you'll bring me back to, we've got some matters involving notices of motion, and we only have two motions that either side is ready to talk about anyway; right?

P (CDR XXXX): We have two motions, well actually, three, sir. One brought by the prosecution.

PO: Protective order?

P (CDR XXXX): Yes, sir.

PO: Okay. That is in chambers.

DC (LCDR Swift): I see that as off line, sir.

PO: Well it's not off line.

DC (LCDR Swift): In chambers.

PO: Okay. What I'm asking you is, what does it hurt you -- meaning the government -- if you've already done all the work? And I can look at Captain XXXX, and he's ready to stand up and argue right now. So what does it hurt you if I say fine, we'll wait and see whether these challenges are granted or not. Do you lose anything by not having those two motions heard tonight?

P (CDR XXXX): Is it imperative that those two motions get heard tonight?

PO: Do you lose something, Commander XXXX?

P (CDR XXXX): Just from a practical standpoint, we lose logistics. It may be difficult to get us together as a group again, and we don't know the timing. I also don't know what timing you're proposing for when we can get together again. I don't know the individual members' schedules. If you're telling me that it's two months down the line before we are able to regroup, then I would say the entire system is prejudiced because that's -- we need to keep this moving forward.

We have a December 11th trial date proposed by the defense that we've agreed to. If we're going to keep that schedule, then we need to begin resolving the issues that we can. Sir, what it comes down to is a determination by you in making this decision as to whether you think that there is a reasonable probability that we're going to drop below quorum. Our position is, actually, that is just not there. We don't think that is a reliable process.

PO: Okay. Let me ask you, Commander Swift: You have two motions?

DC (LCDR Swift): Yes, sir.

Do those motions have any evidentiary matters attached thereto that the members have to hear

evidence on? I haven't heard any notice of witnesses or anything for tonight.

DC (LCDR Swift): For tonight, no, sir.

PO: Well, you've got two motions.

DC (LCDR Swift): Yes, sir.

PO: Do you have to have evidence for those?

DC (LCDR Swift): No, I don't believe so, sir.

PO: No, this is a --

DC (LCDR Swift): May I have a moment, sir?

PO: Yeah.

DC (LCDR Swift): No, we don't need that.

PO: You're telling me that you will not need any evidence for these motions, period?

DC (LCDR Swift): Beyond what's already been furnished as attachments, sir.

PO: Okay. Thank you.

DC (LCDR Swift): Sir, I'd like to address Commander XXXX's logistics issue.

PO: Okay.

DC (LCDR Swift): Yes, sir. We also have noticed seven other motions that have to be developed and argued. Obviously we're all going to have to get back together again. I would have no objection during the continuance to furnish to the motion to all of the members, to allow them to read it, to have that period of time when they get back, and some of them may well become over the status review area. It is quite possible they might have one, although in the meantime he is scheduled for 3 December, it could

be moved up. I don't know. That would change our posture at this point.

PO: Thank you, Commander Swift.

DC (LCDR Swift): So what I would --

PO: Thank you, Commander Swift.

P (CDR XXXX): Sir, the only other issue I would bring up is since Commander Swift brought up his notice of motions, some of those notice of motions are his own motions for a speedy trial. So when you ask if there's anything that impacts us, that prejudices us, the defense has said that they want a speedy trial, so it seems tough to coordinate those two items.

PO: There's never been a requirement that an attorney argue only one of 63 points of view, and I'm not being sarcastic, that is the way it goes. I believe that this is now a matter of record that he wants a continuance, and that can obviously be brought to whoever is going to make a decision, if a decision is going to be made. You're requesting a continuance on those motions solely; right? That's it?

DC (LCDR Swift): Yes, sir. On those motions, yes, sir.

PO: Okay. Well, there's a difference -- there's a difference between proceeding -- holding the proceedings in abeyance and the continuance. You're requesting a continuance on those motions?

DC (LCDR Swift): Yes, sir.

PO: Thank you. Okay. Please call the members.

The members entered the hearing room.

PO: Please be seated. The commission will come to order. Let the record reflect that all members are present and all other parties present are still in

the courtroom.

Members, I have received challenges for cause against various members. I am going to forward the transcript of the challenges of the voir dire, each member's questionnaire, which includes mine, the challenges made by counsel, the opposition by opposing counsel, and the various talk that went on about it to the appointing authority for his decision under MCI. I am not going to hold the proceedings in abeyance. In other words, we're going to continue on; however, we are going to get to a point where we have a continuance. Any question on what I just said?

Apparently not.

Okay. Members, I'm now going to give you some instructions on the procedures we're going to be using. Each of you received earlier some preliminary administrative-type instructions which are now being marked as the next review exhibit in order, 10. If you think there is a conflict between the instructions that you got previously, and the ones I'm about to give you, the ones you get now control.

Either side have any objection to the instructions -- the preliminary ones that have just been marked?

P (CDR XXXX): No, sir.

DC (LCDR Swift): No, sir.

PO: I have been appointed as the presiding officer. On the 24th -- on the 23rd you were given the President's military order, the military commission orders, DoD Directive 5105.7, and Military Commission Instructions, except instruction Number 8. Those references will apply to all cases in which you may be a commission member. In the references in establishing the commission, the

presiding officer is charged with certain duties. Among these is that I will preside over the commission proceedings during open and closed sessions. As I am the only lawyer appointed to the commission, I will instruct and advise you on the law. However, the President has directed that the commission will decide all questions of law and fact. So you are not bound to accept the law as given to you by me. You are free to accept the law as argued to you by counsel either in court, or in motions, or attachments thereto.

In closed conferences, my voice and vote will count the same as any other member. During any recess or adjournment, we will not discuss the case with anyone, not even among ourselves. We will hold our discussions of the issues in closed conference when all members are present. In this case, we will consider only evidence properly admitted before this commission. We will not consider other accounts of the trial, or information from other sources, and we will limit our contact with counsel, the accused, and potential witnesses.

During the course of the proceedings, you may not discuss the proceedings with anyone who is not a member of the panel. If anyone who is not a member attempts to discuss the proceedings with you, notify me immediately and appropriate action will be taken. When we're in closed conference deliberations, we alone will be present. We'll remain together and allow no unauthorized intrusion into our deliberations.

Each of us has an equal voice and vote in discussing and deciding all issues submitted to us. I'll act as presiding officer during closed conference deliberations, and I'll speak for the commission in announcing results. The issue submitted will be decided based upon matters properly presented before this commission. Outside influence from superiors, other government officials, the media, or any other source will not be tolerated. If any attempt is made to influence

you in the performance of your official commission duties, you shall notify me immediately. It is impermissible for the appointing authority, a military commander, or any other government official who may have influence over your career to reprimand or admonish you because of the way you perform your duties. If any such action takes place, notify me immediately.

Okay. Look, you all may serve as members and alternate on more than one case. Each case is separate. You can't consider evidence or motions from one case on another, unless I explicitly advise you that you can. Please mark any notes so that you can indicate this.

Okay. You all have seen the security arrangements around the building, in the building, and in the courtroom. Those arrangements are made by the local commander. We're required to follow the arrangements that he made because we're within his AO. You may not infer or conclude from the security arrangements that the accused is guilty of any offense, or that he presents a danger. Operational requirements of the local command have nothing to do with this accused in this courtroom. The only evidence you may consider on the determination of the guilt or innocence, or on a sentence, is evidence presented to you during proceedings. Security arrangements are not part of that evidence.

Colonel XXXX, you've been designated an alternate member of this commission. You may become a member should there be a vacancy that needs to be filled. As an alternate member, you will attend all open and closed sessions, but you will not be present for any closed conferences, or deliberations, unless your status changes from alternate to member. Should it change you'll get more instructions; okay?

Members, you are not authorized to reveal your vote, or the factors that led to your vote, or the

vote or comments of another member when it comes to deliberations on findings or on sentencing if we get to sentencing. This is a lawful order from me to you. You may only reveal such matters if you're required to do so by superior competent authority in the military commission process, namely the appointing authority, the general counsel, the review panel for Military Commissions, the Secretary of Defense, or the President of the United States, or by a federal district court -- a U.S. federal court. That order is continuing and does not expire. The appearance and demeanor of all of us should reflect the seriousness with which we view the trial. So pay careful attention. If you all need a break let me know. Any questions about those instructions?

Apparently not.

Objections, trial?

P (CDR XXXX): No, sir.

DC (LCDR Swift): No, sir.

PO: Counsel for both sides understand the provisions of MCO-1, governing protected information?

P (CDR XXXX): Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: You understand that as soon as practicable, you got to notify me of any attempt to offer evidence involving protected information?

P (CDR XXXX): Yes, sir.

DC (LCDR Swift): Yes, sir.

PO: Other than the protective order, which we've discussed before, is there any issue relating to the protection of witnesses that we have to take up at this time?

P (CDR XXXX): No, sir.

DC (LCDR Swift): No, sir.

PO: Okay. You all know that if you got any issues on that sort of thing, you have got to let me know immediately; right?

P (CDR XXXX): Aye, sir.

DC (LCDR Swift): Aye, sir.

PO: Okay. As noted on the record earlier, we've had a couple of meetings between counsel and myself, and we've also talked on the record here.

Commander Swift, on the 31st of July, you provided four notices of motion. One was a request for extension, it was granted. One was to keep me from holding sessions without members, which is O.B.E.'d (ph). One which had to do with the assistant to the presiding officer and one which had to do with keeping me from unilaterally ruling on motions law and fact; right? The only one that is still extant to any degree is the one about the assistant to the presiding officer; is that correct?

DC (LCDR Swift): It's somewhat involved in the UCI motion.

PO: Extant to some degree?

DC (LCDR Swift): Yes, sir.

PO: Okay. You also prepared -- you provided the court, what, nine motions on the 19th of August? And in each of those motions, you requested a continuance until a federal district court ruled on them; is that correct?

DC (LCDR Swift): Yes, sir.

PO: Not on them, but on your motion for habeas corpus on your writ?

DC (LCDR Swift): And mandamus, yes, sir.

PO: Okay. Are you prepared at this time to offer me any law that says I am required to give you a continuance on those motions?

DC (LCDR Swift): I would like a 15-minute recess to get the cases, sir.

PO: Do you have cases that say that?

DC (LCDR Swift): I have cases that I argue by implication.

PO: Okay. So thank you. Are you prepared to offer me a law that says I can't give him a continuance on those, Commander XXXX? I can't say, I can't.

P (CDR XXXX): Sir, we have a memorandum of law that puts out our position on why you should not, and that the defense is required to exhaust the remedies available. So, yes, sir, I would say that we do.

PO: Is required to what the remedies available?

P (CDR XXXX): He has to exhaust his available remedies before he can even get to the federal court. The exhaustion is this military commission and the processes that follow. So our position is until he has gone through this system, he cannot even have it litigated in federal court.

PO: Okay. Do you have -- have you prepared those motions?

DC (LCDR Swift): Have I prepared the motions?

PO: The motions?

DC (LCDR Swift): No, sir. I have not.

PO: Okay. Forgetting the law on the subject, Commander XXXX, what harm will you suffer if I grant him a continuance? Not until the federal court district

rules, but until a more reason -- until a more reasonable time to present those motions? And I'm asking.

P (CDR XXXX): Sir, we don't object to you granting a continuance to a reasonable time. When I argued before it was arguing the abeyance issue, not necessarily a continuance request. We do not want to be tied to the proceedings in the federal court. Certainly, we want to be reasonable, and if the defense is asking for time to prepare, we're certainly willing to be reasonable on that matter. I would again raise the issue, though, that we are put in a difficult position because of his request and demand for a speedy trial. So as long as Commander Swift is the one requesting the continuance and that is understood by all parties involved --

PO: Well, he just said it.

P (CDR XXXX): -- and the implications of that, sir. I'm sure he can say that, but for the commission as a whole I want to make sure the implications of that are understood. It is not the government, the prosecution, slowing down the process.

PO: So you have no direct harm if I grant him the continuance on those nine motions; right?

P (CDR XXXX): A reasonable continuance, no, sir.

PO: Commander Swift, in connection with those nine motions, if you are not given until -- do you have any idea when the federal district court is going to rule?

DC (LCDR Swift): I should be able to give a better idea. At this time, no, sir. I expect scheduling this week transferred from Washington State to Washington District Court, and arrive while we are down here. So they have not been scheduled yet. However, we are through -- for the Presiding Officer's knowledge, we are through the position of

having petition and answer and prior to transfer, we were days from argument. So if it's picked up at the same level, it could be quite quick. We are petitioning, we have an answer, and in habeas petition, it is argument and a decision and mandamus.

PO: Could you prepare those motions, say, by the 1st of October? The 1st of October is a long time from now.

DC (LCDR Swift): If -- I -- what I would like to -- yes, I can. Physically, I can write them by the 1st of October. I would hope to have some help, physically I can do that.

PO: I haven't forgotten your assistant defense counsel. We are going to address that.

DC (LCDR Swift): Yes, sir. Physically, I believe that, yes, I could write them by the 1st of October. In that portion, and I would like to be able to address the question of whether this -- in writing those motions, readdress the question of abeyance by this -- or by this panel until the federal court rules. We are basically going to be in two courts at one time. I believe the proper place to take that up would be in the motions themselves. I don't object to scheduling them, but I will again --

PO: How can I schedule the motions and listen to you argue the motions if I -- I'm missing something here.

DC (LCDR Swift): I'm requesting an abeyance on rulings -- so that if -- this happens in federal court or other courts all the time. I would give you an example, sir.

PO: Okay. Wait a second. You are requesting that we not -- that the commission not rule on the motions?

DC (LCDR Swift): Yes, sir.

PO: But you're prepared to argue them and present them?

DC (LCDR Swift): Yes, sir.

PO: Okay. And you just don't want us to present -- to rule on them?

DC (LCDR Swift): Yes, sir. I think -- can I give an example?

PO: No, because, I mean that's fine. On the 1st of October, if you give me the motions, then we can see what happens. I mean, heck, you told me they got the thing right there in D.C. They'll probably have it done by next week.

Okay. Do you object to me setting a date of the 1st of October for the motions on the nine motions that we are talking about to be received?

P (CDR XXXX): No, sir.

PO: Thank you. In your motion, you may include whatever you want, because by that time you'll know more about what is going on about whatever the abeyance issue was. Abeyance -- okay. So we've got your nine motions due on the 1st.

You have seen his notices. Can you have your responses, when can you have your responses to him?

DC (LCDR Swift): I'd would like two weeks, sir.

PO: What is that, the 15th? You are writing all this down; right?

P (CDR XXXX): I've got it, sir.

PO: Okay. And will a week be enough for you to do a reply?

DC (LCDR Swift): Yes, sir.

PO: Okay. I thought so. There, that's your nine motions, and somewhere buried in there is the notice of motion that you're still doing about the assistant to the presiding officer. Can you -- no, by the 1st of October, advise counsel, advise the prosecution and the commission whether or not you intend to go forward on that issue; okay?

DC (LCDR Swift): I will, sir.

PO: Thanks.

P (CDR XXXX): Sir, I would just ask that if he does intend to go forward on that issue, we ask that his actual motion for that issue be due on the 1st of October.

DC (LCDR Swift): It will be possible.

PO: Look at that, he is ready.

P (CDR XXXX): We're Navy guys, we cooperate, sir.

PO: Okay. Now, Commander Swift, you've provided two motions to me and opposing counsel yesterday?

DC (LCDR Swift): Yes, sir, I did.

PO: At 2130 last night, Captain XXXX caught me and said, here is our response.

DC (LCDR Swift): It's wonderful to have assets, sir.

PO: Right. I agree. Okay. You have requested a continuance in the argument, the oral argument by counsel on those motions?

DC (LCDR Swift): Yes, sir, I have.

PO: And you say, okay, judge, because he also said that when those motions are now complete they can go to the commission members, and all we have to do is argue there's going to be no evidence called on them whatsoever except what has been put in. So you don't object to a continuance, other than a

standard objection?

P (CDR XXXX): Let's be careful on that, sir. We don't anticipate, and I don't believe the defense anticipates any witnesses. We also attached evidence to our motion response, and we would like the evidence we attach to our response and --

PO: Perhaps I said it incorrectly. I have here in my hot little hand, his motions and your responses. That is all that is going to be going to the members. And when we meet to discuss this, all I am going to hear from you all is argument?

P (CDR XXXX): Correct, sir.

PO: Right?

DC (LCDR Swift): Yes, sir.

PO: Okay. Now, would you agree that when we come back to hear the motions, the nine motions, and perhaps the one motion we could also hear these two motions?

DC (LCDR Swift): Yes, sir.

P (CDR XXXX): Yes, sir.

PO: Thank you. I'm going to look at a date -- what date were we up to now by his reply? Was it --

P (CDR XXXX): He has 11 -- okay his reply takes us to the 22nd of October.

PO: XXXX. I am going to talk to the members and see if we can schedule a session the first week in November. I'm not talking to them right now, I am just sort of looking at them. Is there anything impossible for counsel about the first week in November?

P (CDR XXXX): No, sir.

DC (LCDR Swift): There is only one consideration and I would like to talk to my client about it. It is that I believe that the first week in November we'll be in Ramadan, and I am going to ask him whether he will be fasting for the period of time. If -- I hadn't consulted with him on that, if I could have a moment?

The defense counsel and accused conferred.

DC (LCDR Swift): My client does not have an objection during the periods of Ramadan, so I have no objection.

PO: Okay. Bailiff, please grab those motions from the court reporter and bring them over here. RE next, which is 11, will be defense motion for dismissal based on unlawful command influence. 12 will be the prosecution response. 13, dismissal for failure to accord the accused a status review hearing; and 14 the prosecution response.

I intend, counsel, to give members copies of both motions, and they will review them so they will be prepared to listen to counsel argument when we come back. Any problems with that?

P (CDR XXXX): No objection, sir.

DC (LCDR Swift): No objection, sir.

PO: I direct counsel to file with me by the 11th -- the 10th of September, briefs. These briefs will address the meaning of the provision of MCO Number 1, section 4(A)5(D). Specifically, these briefs will focus on whether these two motions, RE 11 and 13, are interlocutory questions which must be certified to the appointing authority for his decision because the disposition of the motion would affect a termination of the proceedings. In other words, am I required to certify these motions, or am I only required to certify the motions if the commission is prepared to issue a ruling granting those motions.

Any questions about what I'm talking about?

P (CDR XXXX): No, sir.

DC (LCDR Swift): No, sir.

PO: Okay. Counsel for both sides, I've issued various presiding officer memoranda. If you have objections, state them now or provide them to me in writing by next Tuesday. Got it?

Okay. Through motions and discussions, I have learned that there's concerns about communication with the office of the appointing authority. Does counsel for either side object to me requesting interpretations of the MCO or MCIs and the appointing authority's area of interest directly by mail, or e-mail from me to Mr. Altenburg after notice to counsel and providing counsel the opportunity to brief the issue?

P (CDR XXXX): No, sir, we would not. Although obviously we want what occurs to be made a matter of record formally.

DC (LCDR Swift): Yes, sir. We don't object, sir. We understand that it will be a part of the record.

PO: Accused and counsel, please rise.

Salim Ahmed Hamdan, how do you plead?

DC (LCDR Swift): Salim Ahmed Hamdan through counsel defers pleas until the resolution of motions.

PO: Requests deferral, please?

DC (LCDR Swift): We request deferral of resolution of motions.

PO: Be seated. Do you have any objection to the deferral of entry of pleas?

P (CDR XXXX): No objection, sir.

PO: Okay. Does counsel for either side have anything further at this time? [Negative response]

Members, anything further at this time? [Negative response]

The court is in recess to meet upon further call, or as scheduled on the record.

DC (LCDR Swift): Sir, actually, I'm sorry. Sorry.

PO: The court is called to order. Let the record reflect that all parties present when the court recessed are still present in the courtroom.

Yes, Commander Swift?

DC (LCDR Swift): I'm sorry. Sir, I have one administrative note not requiring the other members that I would like to take up with yourself outside, on the record. It has to do with your voir dire of the presiding officer.

PO: All rise.

Members, you are in recess.

The members departed the courtroom.

Be seated. The court will come to order and let the record reflect all the members except for myself have left the courtroom. All the other parties are present.

Yes, Commander?

DC (LCDR Swift): Yes, sir. It came to my attention after the voir dire that there was a tape made regarding the 15 July meeting between yourself and counsel. I'd like permission to send that tape along with the other matters that I'm submitting on your voir dire regarding your qualifications.

PO: And why would you like that?

DC (LCDR Swift): To go toward the idea of whether you have an opinion or not, sir.

PO: On the questions of?

DC (LCDR Swift): Speedy trial, sir.

PO: Okay. And the tape goes to show what?

DC (LCDR Swift): Your opinion at the time, sir. I have not yet transcribed it. If it doesn't show anything -- I am proceeding here based on what I've been told by other counsel.

PO: Okay. I would be -- let me think about this. Okay, let me think about this. I am reopening the voir dire of me. Explain to me -- ask me what you want about what I said or may have said on the 15th.

DC (LCDR Swift): Yes, sir. It's my understanding, sir, that on the 15th you expressed an opinion as to whether the accused have -- whether any detainee had a right to a speedy trial.

PO: Do you think that's correct or do you think that's in reference to Article 10?

DC (LCDR Swift): My understanding from counsel was that it referenced whether they would have a right to a speedy trial under Article 10 or rights, generally. I confess, sir, I have not heard the tape.

PO: Okay. Why don't you ask me if I am predisposed on that.

DC (LCDR Swift): Are you predisposed towards those issues, sir?

PO: I believe in the meeting -- I don't remember speedy trial, I remember Article 10 being mentioned, and I believe I said something to the effect of, Article

10, how does that come into play, or words to that effect. I did not know that my words were being taped, and I must confess that when I walked into the room that day I had no idea that Article 10 would come into play because I hadn't had an occasion to review Article 10. It is not something that usually comes up in military justice prudence -- jurisprudence. So I'm telling you right now that I don't have a predisposition towards speedy trial. However, although the tape was made without my permission, without the permission of anyone in the room, I do give you permission to send it to the appointing authority with the other matters.

DC (LCDR Swift): Sir, what I would like to ask, if I transcribe it, that I send it to you first.

PO: I don't want to see it.

DC (LCDR Swift): Yes, sir.

PO: Okay. Well, wait a second. Do you want to change -- do you want to add on anything to your challenge or stick with it?

DC (LCDR Swift): No, sir.

PO: How about you?

P (CDR XXXX): No objection to the tape being sent, sir.

PO: Okay. Before I call -- I put the court in recess, Commander Swift, do you have anything else?

DC (LCDR Swift): No, sir, I don't; I really don't, we really don't, sir.

PO: Trial?

P (CDR XXXX): We really, really don't, sir.

PO: Court is in recess.

The Commission Hearing recessed at 1835, 24 August 2004.

UNOFFICIAL TRANSCRIPT

AUTHENTICATION OF COMMISSIONS PROCEEDINGS

in the case of

United States v. SALIM AHMED HAMDAN

a/k/a Salim Ahmad Hamdan

a/k/a Salem Ahmed Salem Hamdan

a/k/a Saqr al Jadawy

a/k/a Saqr al Jaddawi

a/k/a Khalid bin Abdallah

a/k/a Khalid wl'd Abdallah

This is to certify that Pages _____ through _____ are an accurate and verbatim transcript of the foregoing proceedings.

Peter E. Brownback III
Colonel, U.S. Army
Presiding Officer

Date

No. 040004

UNITED STATES

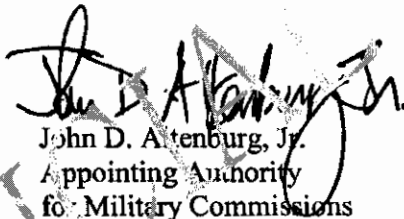
v.

SALIM AHMED HAMDAN
a/k/a Salim Ahmad Hamdan
a/k/a Salem Ahmed Salem Hamdan
a/k/a Saqr al Jadawy
a/k/a Saqr al Jaddawi
a/k/a Khalid bin Abdallah
a/k/a Khalid wl'd Abdallah

Approval of Charge
And Referral

July 13, 2004

The charge against Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah) is approved and referred to the Military Commission identified at Encl 1. The Presiding Officer will notify me not later than July 26, 2004, of the initial trial schedule, including dates for submission and argument of motions, and a convening date.


John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

Review Exhibit 1

Page 1 Of 2

No. 040004

UNITED STATES

v.

SALIM AHMED HAMDAN

a/k/a Salim Ahmad Hamdan

a/k/a Salem Ahmed Salem Hamdan

a/k/a Saqr al Jadawy

a/k/a Saqr al Jaddawi

a/k/a Khalid bin Abdallah

a/k/a Khalid w'l'd Abdallah

Military Commission Members

July 13, 2004

The following officers are appointed to serve as a Military Commission for the purpose of trying any and all charges referred for trial in the above-styled case. The Military Commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer. Each member of the Military Commission will serve until relieved by proper authority.

In the event of incapacity, resignation, or removal of a member who has not been designated as the Presiding Officer, the alternate member is automatically appointed as a member.

Colonel Peter E. Brownback, III, USA (Retired) Presiding Officer

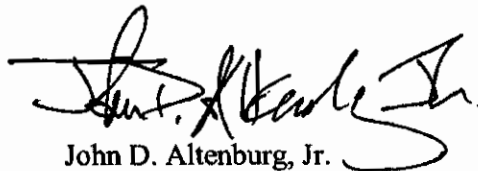
Colonel [REDACTED], Jr., USMC, Member

Colonel [REDACTED], USMC, Member

Colonel [REDACTED], USAF, Member

Lieutenant Colonel [REDACTED], USAF, Member

Lieutenant Colonel [REDACTED], USA, Alternate Member



John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

~~SECRET~~

THE WHITE HOUSE
WASHINGTON

OFFICE OF THE
SECRETARY OF DEFENSE
2003 JUL 14 PM 5:12

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources, including the factual summary from the Department of Defense Criminal Investigation Task Force dated June 24, 2003 and forwarded to me by the Deputy Secretary of Defense by letter dated July 1, 2003;

Pursuant to the Military Order of November 13, 2001 on "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism";

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the Armed Forces of the United States, hereby DETERMINE for the United States of America that in relation to Salim Ahmed Hamdan, Department of Defense Internment Serial No. US9YM-00149DP, who is not a United States citizen:

- (1) There is reason to believe that he, at the relevant times:
- (a) is or was a member of the organization known as al Qaida;
 - (b) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
 - (c) has knowingly harbored one or more individuals described in subparagraphs (a) or (b) above.
- (2) It is in the interest of the United States that he be subject to the Military Order of November 13, 2001.

Accordingly, it is hereby ordered that, effective this day, Salim Ahmed Hamdan shall be subject to the Military Order of November 13, 2001.

DATE: July 3, 2003
White House Office-controlled Document

DECLASSIFIED IAW
JTF-GTMO-J2 SCG,
10 JUN 2004
DECLASSIFIED ON: 23 AUG 2004

~~SECRET~~

X02375 / 03
Review Exhibit

Interpreters



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Review Exhibit 3

Page 1 Of 1

**REVIEW EXHIBIT 4: PROTECTIVE ORDER
FOR INTERPRETERS' NAMES**

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DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

July 28, 2004

MEMORANDUM FOR COMMANDER [REDACTED] USN
LIEUTENANT COLONEL [REDACTED] USMC
LIEUTENANT COLONEL [REDACTED] USMC
MAJOR [REDACTED] USA
CAPTAIN [REDACTED] USA
LIEUTENANT [REDACTED] JR. USNR
CAPTAIN [REDACTED] USAFR

SUBJECT: Detailed Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Sections 4B(2) of Military Commission Order No. 1, dated March 21, 2002, and Section 3B(9) of Military Commission Instruction No. 3, dated April 30, 2003, the above named counsel are detailed and designated as follows:

United States v. al Bahlul

Detailed Prosecutor: Commander [REDACTED]

Detailed Assistant Prosecutors: Lieutenant Colonel [REDACTED], Captain [REDACTED]

United States v. al Qosi

Detailed Prosecutor: Lieutenant Colonel [REDACTED]

Detailed Assistant Prosecutors: Lieutenant [REDACTED], Captain [REDACTED]

United States v. Hamdan

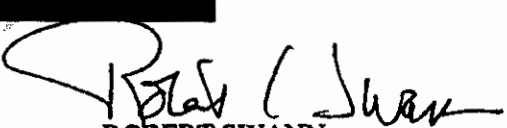
Detailed Prosecutor: Commander [REDACTED]

Detailed Assistant Prosecutors: Captain [REDACTED]

United States v. Hicks

Detailed Prosecutor: Lieutenant Colonel [REDACTED]

Detailed Assistant Prosecutors: Major [REDACTED]


ROBERT SWANN
Colonel, U.S. Army
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor
Mr. [REDACTED]

Review Exhibit 5

Page 1 Of 1



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

23 July 2004

MEMORANDUM DETAILING DEFENSE COUNSEL

TO: Lieutenant Colonel Sharon Shaffer, Major Mark Bridges, Major Michael Mori, LCDR Philip L. Sundel, LCDR Charles D. Swift

SUBJECT: Detailed Defense Counsel

Consistent with my authority as Chief Defense Counsel and the provisions of sections 4C and 5D of Military Order No. 1, dated March 21, 2002, and section 3B of Military Commission Instruction # 4, dated 15 April 2004, the above named counsel are detailed and designated as follows:

United States v. Al Bahlul

Detailed Defense Counsel: LCDR Philip Sundel

Assistant Detailed Defense Counsel: Major Mark Bridges

United States v. Al Oosi

Detailed Defense Counsel: Lieutenant Colonel Sharon Shaffer

United States v. Hamdan:

Detailed Defense Counsel: LCDR Charles Swift

United States v. Hicks:

Detailed Defense Counsel: Major Michael Mori

Colonel Will A. Gunn, USAF
Chief Defense Counsel
Office of Military Commissions

Review Exhibit 6

Page 1 Of 1



UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

a/k/a Salim Ahmad Hamdan

a/k/a Salem Ahmed Salem Hamdan

a/k/a Saqr al Jadawy

a/k/a Saqr al Jaddawi

a/k/a Khalid bin Abdallah

a/k/a Khalid wl'd Abdallah

)
)
)
) **CHARGE:**
) **CONSPIRACY**
)
)
)
)
)
)

Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah) is a person subject to trial by Military Commission. At all times material to the charge:

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 3, 2003 that Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah, hereinafter "Hamdan") is subject to his Military Order of November 13, 2001.
2. Hamdan's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others around 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee;

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security committee; finance committee; media committee; and religious/legal committee.

7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.
9. In February of 1998, Usama bin Laden, Ayman al Zawahari and others under the banner of the "International Islamic Front for Jihad on the Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
10. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize enemies of God."
11. Since 1989, members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

12. Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jaddawi, a/k/a Saqr al Jaddawi, Khalid bin Abdallah, a/k/a Khalid w/d Abdallah, hereinafter "Hamdan"), in Afghanistan, Pakistan, Yemen and other countries, from on or about February 1996 to on or about November 24, 2001, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Saif al Adel, Dr. Ayman al Zawahari (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
13. In furtherance of this enterprise and conspiracy, Hamdan and other members or associates of al Qaida committed the following overt acts:

- a. In 1996, Hamdan met with Usama bin Laden in Qandahar, Afghanistan and ultimately became a bodyguard and personal driver for Usama bin Laden. Hamdan served in this capacity until his capture in November of 2001. Based on his contact with Usama bin Laden and members or associates of al Qaida during this period, Hamdan believed that Usama bin Laden and his associates were involved in the attacks on the U.S Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001.
- b. From 1996 through 2001, Hamdan:
- 1) delivered weapons, ammunition or other supplies to al Qaida members and associates;
 - 2) picked up weapons at Taliban warehouses for al Qaida use and delivered them directly to Saif al Adel, the head of al Qaida's security committee, in Qandahar, Afghanistan;
 - 3) purchased or ensured that Toyota Hi Lux trucks were available for use by the Usama bin Laden bodyguard unit tasked with protecting and providing physical security for Usama bin Laden; and
 - 4) served as a driver for Usama bin Laden and other high ranking al Qaida members and associates. At the time of the al Qaida sponsored attacks on the U.S Embassies in Tanzania and Kenya in August of 1998, and the attacks on the United States on September 11, 2001, Hamdan served as a driver in a convoy of three to nine vehicles in which Usama bin Laden and others were transported to various areas in Afghanistan. Such convoys were utilized to ensure the safety of Usama bin Laden and the others. Bodyguards in these convoys were armed with Kalishnikov rifles, rocket propelled grenades, hand-held radios and handguns.
- c. On divers occasions between 1996 and November of 2001, Hamdan drove or accompanied Usama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures. During these trips, Usama bin Laden would give speeches in which he would encourage others to conduct "martyr missions" (meaning an attack wherein one would kill himself as well as the targets of the attack) against the Americans, to engage in war against the Americans, and to drive the "infidels" out of the Arabian Peninsula.
- d. Between 1996 and November of 2001, Hamdan, on divers occasions received training on rifles, handguns and machine guns at the al Qaida-sponsored al Farouq camp in Afghanistan.

Biographical Summary

Peter E. Brownback III

Born 22 October 1947 in Philadelphia, PA. Graduated from Johns Hopkins University in Baltimore, MD, in June 1969 with a Bachelors of Arts in International Affairs.

Received a Regular Army commission as an infantry officer in June 1969. After initial officer training, assigned as a platoon leader in 3/325 PIR, 82d Abn Div, Fort Bragg, NC from October 1969 to February 1970.

Vietnam service from June 1970 - June 1971 as an infantry platoon leader, armored cavalry platoon leader, and battalion S-1, all with the 173d Airborne Brigade.

Served with 5th Special Forces Group at FBNC from June 71 to February 1973 as an A Detachment Commander and Battalion S-3.

Infantry Officer Advanced Course -- June 1973 - May 1974.

Funded Legal Education Program student at TC Williams School of Law, University of Richmond, 1974-77. Summers at Fort Lee working as assistant trial and assistant defense counsel. Admitted to Virginia Bar, June 1977.

Assigned to Office of the Staff Judge Advocate, 82d Airborne Division, FBNC, 1977-1980. Trial Counsel, Chief Administrative Law, Chief Military Justice.

Senior Defense Counsel, Fort Meade, MD. 1980-81.

Operations Officer, US Army Trial Defense Service, Falls Church, VA. 1981-84.

Legal Advisor/Legal Instructor, USAJFK Center for Special Warfare, FBNC, 1984-85.

Legal Advisor, Joint Special Operations Command, FBNC, 1985-88.

Senior Military Judge, Mannheim, FRG. 1988-1991.

Director of Legal Operations, JSOC, FBNC, Jan 91 - Apr 91.

Staff Judge Advocate, 22d SUPCOM/ARCENT Forward, Dhahran, KSA, May 91 - May 92.

Chief Circuit Judge, 2d Judicial Circuit, FBNC, 1992 - 1996.

Chief Circuit Judge, 5th Judicial Circuit, Mannheim, FRG, 1996 - 1999.

Entered on the retired rolls on 1 July 1999.

Recalled to active duty on 14 July 2004.

Review Exhibit 8

Page 1 Of 13

AWARDS: Combat Infantryman's Badge, Special Forces Tab, Ranger Tab, Master Parachutist Badge, DSM, LOM x 3, BSM x 5, MSM x 2, JSCM x 2, ARCOM x 2, AAM, JMUA x 2, NDSM, VSM, SWABS, HSM, RVNGCUC, RVNCAMU, KUKULISM

PERSONAL: Married to LTC [REDACTED], USA (Ret).

[REDACTED] - born [REDACTED]

[REDACTED] - born [REDACTED]

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Review Exhibit 8

Page 2 Of 13

**Voir Dire Question Prepared by Presiding Officer, COL Peter E. Brownback
(Taken from the Draft Trial Guide.)**

1. I do not know any accused whose case has been referred to the Commission.
2. I do not know any person named in any of the charges.
3. Of the names of witness I have seen so far, I do not recognize any of their names.
4. I do not have any prior knowledge of the facts or events in this case that will make me unable to serve impartially.
5. I do not know, and have no command relationship with, any other member.
6. I believe that I can vote fairly and impartially notwithstanding a difference in rank with other member. I will not use my rank to influence any other member.
7. I have not had any dealings with any of the parties to the trial, to include counsel for both sides, that might affect my performance of duty as a Commission member in any way.
8. I have not had any prior experience, either personal or related to my military duties, that I believe that would interfere with my ability to fairly and justly decide this case.
9. No family member, relative, or close friend that I am aware of was the victim of the events of 9-11, and has not been the victim of any alleged terrorist act. I have been told that a former Judge Advocate General's Corps officer was on one of the planes which hit the World Trade Center. This officer was assigned to Fort Bragg at some time during the period 1984 to 1988, while I was assigned there. I do not recall the last time I saw the officer, nor do I recall his name. He was not assigned to the same unit(s) to which I was assigned, although we met, I feel certain, at one or more of the judge advocate functions on base. After my wife left Fort Bragg in 1987 for Charlottesville, I had no further occasion to see or meet this officer.
10. I have seen and heard general media reporting about the events of 9-11, al Qaida, Usama Bin Laden, and terrorism on broadcast TV and the various newspapers. Nothing I have seen or read will have any effect on my ability to perform the duties as a Commission member fairly and impartially.
11. I promise as a Commission Member that I will keep an open mind regarding the verdict until all the evidence is in.
12. I know and respect that the accused is presumed innocent and this presumption remains unless his guilt is established beyond a reasonable doubt. I know and respect that the burden to establish the guilt of the accused is on the prosecution. I agree to be guided by and follow these principles in deciding this case.
13. I have nothing of either a personal or professional nature that would cause me to be unable to give my full attention to these proceedings throughout the trial.

Review Exhibit 8

Page 3 Of 13

14. I am not aware of any matter that might raise a question concerning my participation in this trial as a Commission member.

Peter E. Brownback III
Colonel, USA

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Review Exhibit 8

Page 4 Of 13

Presiding Officer Voir Dire Addendum - Relationship with Other Personnel

a. Mr. Haynes: I believe that I once met the General Counsel at the Army's Judge Advocate General's School in 1996 or 1997 as part of an organized run. We exchanged perhaps ten minutes worth of casual chit-chat during the run. Other than that, I have had no contact with Mr. Haynes.

b. Mr. Altenburg:

1. I first met (then) CPT Altenburg in the period 1977-78, while he was assigned to Fort Bragg. My only specific recollection of talking to him was when we discussed utilization of courtrooms to try cases.

2. To the best of my knowledge and belief, I did not see or talk to Mr. Altenburg again until sometime in the spring of 1989 at the Judge Advocate Ball in Heidelberg. Later, in November-December 1990, (then) LTC Altenburg obtained Desert Camouflage Uniforms for COL [REDACTED] and me so that we would be properly outfitted for trials in Saudi Arabia.

3. During the period 1992 to 1995, (then) COL Altenburg was the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg while I was the Chief Circuit Judge, 2nd Judicial Circuit, with duty station at Fort Bragg. Our offices were in the same building. My wife, (then) MAJ [REDACTED], was the Chief of Administrative Law in the SJA office from [REDACTED]. During this period, Mr. Altenburg and I became friends. We saw each other about twice a week and sometimes more than that. We generally attended all of the SJA social functions. He and his wife (and children - depending upon which of his children were in residence at the time) had dinner at our house at least three times in the three years we served at Fort Bragg. I attended several social functions at his quarters on post. Though he was a convening authority and I was a trial judge, we were both disciplined enough to not discuss cases. I am sure there were times when he was not pleased with my rulings.

4. From summer 1995 to summer 1996 when Mr. Altenburg was in Washington and I at Fort Bragg, he and I probably talked on the telephone three or four times. I believe that he stayed at my house one night during a TDY to Fort Bragg (but I am not certain.).

5. During the period June 1996 to May 1999, I was stationed at Mannheim, Germany and Mr. Altenburg was in Washington. Other than the World-Wide JAG Conferences in October of 1996, 1997, and 1998, I did not see nor talk to MG Altenburg except once -- in May of 1997, I attended a farewell dinner hosted by MG Altenburg for COL [REDACTED]. In May 1999, MG Altenburg presided over my retirement ceremony at The Judge Advocate General's School and was a primary speaker at a "roast" in my honor that evening.

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6. Since my retirement from the Army on 1 July 1999, Mr. Altenburg has never been to our house and we have never been to his. From the time of my retirement until the week of 12 July 2004, I have had the occasion to speak to him on the phone about five to ten times. I had two meetings or personal contacts with him during that period. First, in July or August 2001 when I was a primary speaker at a "roast" in MG Altenburg's honor at Fort Belvoir upon the occasion of his retirement. Second, in November (I believe.) 2002, I attended his son's wedding in Orlando, Florida.

7. I sent him an email in December 2003 when he was appointed as the Appointing Authority to congratulate him. I also sent him an email in the spring of 2004 when I heard that he had named a Presiding Officer. Sometime in the spring of 2004, I called his house to speak to his wife. After we talked, she handed the phone to Mr. Altenburg. He explained that setting up the office and office procedures was tough. I suggested that he hire a former JA Warrant Officer whom we both knew.

8. To the best of my memory, Mr. Altenburg and I have never discussed anything about the Commissions or how they should function. Without doubt, we have never discussed any case specifically or any of the cases in general. I am certain that since being appointed a Presiding Officer we have had no discussions about my duties or the Commission Trials.

c. BG Hemingway: I had never met, talked to, or otherwise communicated with BG Hemingway until I reported on 14 July 2004.

d. Members: I have never met or talked to any of the other members of the commission. I have emailed instructions to all of them and received email receipts from all of them. A copy of what I sent to the members was provided to all counsel.

18 August 2004

Subject: Questionnaire #2 - Presiding Officer Voir Dire

1. I have received questions from counsel in Al Bahlul, Hamden, and Hicks. Many of the questions are the same or so nearly the same as to make no difference. I am answering these questions by this memorandum.
2. I refer all counsel to MCO #1, para 6B(1) and (2) - the commission is to provide a full and fair trial, impartially and expeditiously. Further, MCI # 8, para 3A(2), states that questioning of the members, to include the Presiding Officer, shall be narrowly focused on issues pertaining to whether good cause may exist for removal of any member.
3. Professional Background --
 - a. I have served in close ground combat only in Vietnam - where I was a rifle platoon leader and an armored cavalry platoon leader. I do not remember having any occasion to deal with enemy prisoners - either by capturing them or being involved in trying them or questioning them. However, I did work with former Viet Cong who had come over to the ARVN.
 - b. During my time as an infantry officer and a judge advocate, I attended many courses - some of which focused on the law of war and international law. I do not recall the where/when's for these courses. I taught various aspects of international law and law of war at the JFK Special Warfare Center for a year. To the best of my knowledge, I have not attended any courses focusing on LOAC or IL since 1984/85. However, during various presentations at general courses, I may have had some exposure to these subjects.
 - c. I have not received any specialized training, formal or informal, on Al Qaeda, the Taliban, Islamic Fundamentalism, or detainee operations. I have had the occasion to read newspaper and news magazine accounts of various aspects of the topics above. I also have read some articles published in the Army War College journal and the Military Law Review. Additionally I have read numerous articles on various topics while surfing the web.
 - d. I am generally aware of the conduct of operations in Afghanistan and Iraq. I am interested in such operations. I have had occasion to look at the DOD website on Military Commissions. I have not seen any of the data or articles on detainee operations.
 - e. I have not written for publication or spoken publicly about any of the topics in paragraph 3c above.
 - f. I am and have been an associate member of the Virginia State Bar since 1977. I have never practiced law in the civilian sector.

4. Personal Background:

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a. I was raised as a Christian. I do not attend church regularly. I have no antipathy towards Islam, or any of the other major religions. My knowledge of Islam is based primarily upon my readings and my dealings with Saudis, Kuwaitis, and others during my tour in Saudi Arabia in 1991-92. I am not an expert in the area of Islam, although I have some knowledge. I do own a Qur-An, but I do not profess to be a student of the Qur-An.

b. I entered onto the retired rolls on 1 July 1999. I intended to be retired. However, I soon discovered that I was slightly bored. Consequently, at the urging of my wife, I took several part-time jobs. These included being an enumerator for the 2000 Census, a safety person for beach renewal operations, an instructor for an SAT prep course, and an instructor at a local college. I enjoyed all of the jobs and I regretted having to quit two of them upon my recall to active duty.

c. My hearing is within deployment standards. I do not like to have people mumble - I prefer that they speak with a command voice. There is no impairment.

d. **Caveat - see 4e, below.** I belong to several military professional organizations and to various social organizations. None of them is political in nature. I do not attend meetings.

e. I do belong to a local community organization which supports various propositions involving local city management and zoning. It is political only in the sense that it wants voters to vote in accordance with its recommendations - most of which are simply anti-over-development. I have attended at least three of its meetings when the topic was one of interest to me.

f. I am registered to vote. My Voter Registration Card shows NPA in the Party block. I have not campaigned for anyone.

5. Effect of 9/11 and other events:

a. See Questionnaire #1 for the only person I knew who was killed on 9/11.

b. I knew and know many people in the Pentagon. I did not have any personal friends who were killed or injured there; however, I did have friends who were in the building when the plane hit.

c. I have many friends and others who have been stationed in Afghanistan and Iraq. I am aware of the impact of war upon soldiers and their families.

d. There was no specific impact of 9/11 and related events upon me or my family.

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6. Mr. [REDACTED]:

a. I first became aware of [REDACTED] in [REDACTED]. I was the [REDACTED] at [REDACTED]. The post stockade served many posts along the east coast. One of those posts was [REDACTED], where CPT [REDACTED] was a prosecutor. He was the lead prosecutor on a murder case - I became involved in the case through my dealings with the DC at [REDACTED].

b. I next saw LTC [REDACTED] when he was the [REDACTED] in [REDACTED] and I was one of the military judges at [REDACTED]. We had numerous professional contacts and we may have been at two or three social functions together.

c. In 1992, I became the Chief Circuit Judge [REDACTED]. [REDACTED] was LTC (later COL) [REDACTED]. We worked closely together - via telephone and electronic bulletin board (precursor to email) - until his departure for [REDACTED]. During this period, I only saw him at judicial training functions and on one occasion when I promoted him to Colonel.

d. From 1995 to 1996, COL [REDACTED] and I talked and exchanged email routinely on various matters. We worked on the [REDACTED] together and we helped each other with various case-related problems. I saw COL [REDACTED] once, during a judicial training function.

e. From 1996 until my retirement in 1999, COL [REDACTED] and I continued to exchange ideas, suggestions, instructions, and the like by email. I saw him three times at judicial training functions.

f. Upon my retirement in 1999, COL [REDACTED] and I had few occasions to exchange email or telephone calls while he was at [REDACTED]. However, after he retired in [REDACTED], he visited us on several occasions while going to see his parents, who live about [REDACTED] miles from us. On one occasion, he and my wife went deep sea fishing together. When Mr. [REDACTED] would come across a criminal law case which he thought would interest me, he would forward it to me.

g. During the period after the announcement of the Military Commissions in 2001, Mr. [REDACTED] and I discussed the commissions on at least one occasion. He knew that I had put my name in for consideration. On 29 June 2004, I received an email from LTC [REDACTED] at OMC. In it he stated that the Appointing Authority was considering hiring a Legal Advisor to the Presiding Officer and asked if I had any recommendations. I immediately gave him Mr. [REDACTED] name, because:

- 1) I was personally familiar with Mr. [REDACTED] work and work ethic.
- 2) I was personally familiar with Mr. [REDACTED] knowledge of criminal law and procedure.
- 3) I was personally familiar with Mr. [REDACTED] ability to write, edit, and publish procedural matters.

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4) I was aware of Mr. [REDACTED] performance as a military judge, both the highs and the lows.

LTC [REDACTED] asked me for Mr. [REDACTED] contact information and I gave it to him. Subsequently, the Appointing Authority, UP MCO #1, executed a detailing agreement with the Federal Law Enforcement Training Center - whereby Mr. [REDACTED] would be detailed to OMC for a year. While Mr. [REDACTED] is paid by DHS, his employer is OMC. During the period of the detail, Mr. [REDACTED] primary focus is OMC. Mr. [REDACTED] has distributed a copy of the detailing agreement to all counsel.

h. Once LTC [REDACTED] and Mr. [REDACTED] talked, I talked to Mr. [REDACTED] and pointed out some of the problem areas in working with the commissions. He eventually decided to accept the detail.

i. Since 15 July 2004, Mr. [REDACTED] has been part of the procedural preparation for the proceedings before the commissions. He has written procedures, written emails, written memoranda, and prepared various drafts. All of this has been done under my supervision. Mr. [REDACTED] has also prepared memoranda and drafts which he forwarded to the Appointing Authority concerning procedural aspects of the commissions. He did this with my knowledge and consent, but acting for the Appointing Authority. To my knowledge, Mr. [REDACTED] has had many communications with OMC personnel - most by email. I am not aware of any communications between Mr. [REDACTED] and any members of OGC. All of Mr. [REDACTED] communications with OMC personnel were in the area of procedural and logistic preparation for commission proceeding. I believe that it is entirely appropriate for Mr. [REDACTED] to discuss and make recommendations for procedural changes or structure so that the commission process may function efficiently and expeditiously.

j. Mr. [REDACTED] and I have never discussed the substance of any of the cases currently referred to the commission for trial. We have never discussed MCI #2. All of our discussions, efforts, and work have been focused on the procedural requirements to get cases before the commission.

k. I have never had an *ex parte* discussion with Mr. [REDACTED] concerning any of the cases referred to the commission.

7. Selection as Presiding Officer:

a. Sometime in the spring of 2002, I was told by someone that the Presiding Officers of the Military Commissions could be retired officers who were recalled to active duty. I discussed this with COL [REDACTED]

b. In January 2003, I got a call from OCTJ, informing that if I wanted to put my name in for PO, I had to send in a statement. I did and I did.

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c. In December 2003, I read that MG (Ret.) Altenburg had been named the Appointing Authority. In January I received a call from OCTJ wanting to know if I, among others, was still interested. I was.

d. On 24 or 25 June 2004, I got a call from LTC [REDACTED] at OMC. He wanted to know if I was still interested. I was. He told me that an announcement would be made quickly. On 28 June I got four phone messages that some PAO wanted to read me a press release so that I could okay it. I never found the PAO. On 29 June 2004, the announcement was made.

e. MG (Ret.) Altenburg knew that I was interested in being on one of the commissions.

e. That is all I know about the selection process.

8. Military Commissions:

a. The Presiding Officer has specifically designated roles and duties under MCO #1 and the MCI's. Those roles and duties are different, in many ways, from those of the other members of the commission. In some areas, MCO #1 and the MCI's give the Presiding Officer the authority to act for the commission without the formal assembly of the full commission. Under the President's Military Order, the Presiding Officer can be overruled by a majority of the commission in certain areas. For a full explanation of the Presiding Officer's powers, see MCO #1 and the MCI's. As the only member of the commission who is a judge advocate, I will tell the commission what I believe the law to be. However, the President's Military Order states that the commission will decide all questions of law and fact. As with all matters of law, I invite counsel to provide motions and briefs so that I may become better informed - I note that there have been no motions or notice of motions to date on any legal topics.

b. Addressing a specific question, I did in fact state: "Perhaps a better way of looking at the matter is to say that I have authority to order those things which I order done." I then went on to say that this was based on my interpretation of the law and that my interpretation would be the one that counted "until superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives stating that what I am doing is incorrect." Based on a directive from the Appointing Authority, I did not and will not hold commission sessions without the full commission. This directive did change my opinion concerning my ability to hold sessions without the full commission.

c. Based on my interpretation of the MCO and MCI's, the standard for whether or not a member should sit is whether there is good cause to believe that the member can not be fair and impartial and provide a full and fair trial. The determination as to whether there is good cause to relieve a member is made by the Appointing Authority. If I believe that there is good cause to relieve me or any other member, I am required to forward that information to the Appointing Authority for his decision.

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d. I have had the occasion to review various material about military commissions. The commentary on commissions and the legality thereof is about what one would expect - a lot pro, a lot con. The commentary ranges from the legality of the commissions to the structure of the commissions to the law governing the establishment and operation of the commissions. Until these areas have been thoroughly briefed by counsel, I reserve my opinion.

e. Any service member has the right and duty to disobey an unlawful order or general order or regulation. However, the standard under Article 92 is quite high. Obviously, if the order or regulation is patently illegal, the source of the order or regulation does not mitigate the illegality.

f. Counsel are encouraged to provide briefs on the issue of "declaring an order or regulation" unlawful by the Presiding Officer of a commission. I am not prepared to address the issue at this time.

9. Personal Knowledge of Cases:

a. I have read the charge sheets in all four cases which are presently referred to the commission for trial. That is all that I have read or know about any of the cases. I have not seen the Presidential Determinations in the cases. I have not discussed the facts of the cases with anyone - either in my personal or professional capacity. Until I received the charge sheets, I had never heard the names of any of the defendants.

b. If the Prosecution proves all of the elements of an offense beyond a reasonable doubt, then a vote for a guilty finding would be appropriate. If not, then a vote for a not guilty finding would be appropriate.

c. As to the responsibility for the acts of 9/11 and others, the only knowledge I have of the acts and the perpetrators is open news media. If one were to believe what one reads, then it would appear that members of Al Qaeda were responsible for the attacks. I have no opinion as to the actions of specific individuals.

10. General:

a. My participation as a member and Presiding Officer in this commission will have an impact on my personal life. It will have no impact on my professional life - I do not have a professional life. Once these proceedings are finished, I will retire again.

b. Media interest in the case will not have an impact on how I perform my duties.

c. Other than memoranda and emails from OMC - on which counsel were cc'd, I have received no instructions, hints, suggestions, or any other form of communication from anyone in any governmental position (to include OMC and OGC) concerning what I should do as a Presiding Officer in these proceedings. Based on my personal and

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professional knowledge of Mr. Altenburg, my belief is that he wants to have these cases tried fully and fairly. I have not discussed my role as Presiding Officer with Mr. Altenburg at all.

d. I am not aware of any matter which might cause a reasonable person to believe that I could not act in a fair and impartial manner in these proceedings.

Peter E. Brownback III
COL, JA
Presiding Officer

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REVIEW EXHIBITS 9a-e ARE UNDER SEAL

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Instructions to Prospective Commission Members

I am Colonel Peter E. Brownback, III. You and I have been detailed to be members on a Military Commission concerning the trial of certain individuals now being detained at US Naval Station, Guantanamo Bay, Cuba. I have also been detailed as the Presiding Officer of the Military Commission.

1. Each of you will respond by email to the undersigned acknowledging receipt of these instructions. If you prefer to use a different email address for future communications among us, please so advise me at the email address above.

2. Due to the publicity which these cases may have already received, and recognizing the probability of further publicity, each of you is instructed as follows:

a. As a prospective member of the Military Commission which will try a case, it will be your duty to determine the guilt or innocence of the accused as to the charges which have been referred to the Commission for trial. Under the law, the accused is presumed to be innocent of the charges against him. Neither the fact that the charges have been prepared by the government nor the fact that they have been referred to the Commission for trial warrants any inference of his guilt. Your determination as to his guilt or innocence must be based upon the entire evidence in the case as presented to you in open court and upon the law as you will be instructed. Thus, it is important that you keep an open mind and not form or express any opinions on the case until all of the evidence and the applicable law has been presented to you.

b. A trial by Military Commission includes the determination of the ability of each member to sit as a member. As a prospective member, you may be questioned in open session by counsel for either side or by myself to determine whether or not you should serve. You may also receive a questionnaire and other documents from me to prepare prior to trial. Trial by Military Commission requires members who approach the case with an open mind and keep an open mind until all of the evidence and law has been presented and the Commission closes to deliberate. A Commission member should be as free as humanly possible from any preconceived ideas as to the facts or the law. From the date of receipt of these instructions, you will keep a completely open mind and wait until all of the evidence is presented in open session and the Commission has retired to deliberate before you discuss the facts of this case with anyone, including other Commission members.

c. Due to the previous publicity about this case and the probability of further publicity, you are instructed that you must not listen to, look at, or read any accounts of alleged incidents involving these cases. You may not consult any source, written or otherwise, as to matters involved in such alleged incidents. You may not listen to, look at, or read any accounts of any proceedings in these cases. You may not discuss these cases with anyone, and if anyone attempts to discuss these cases with you, you must forbid them to do so and report the occurrence to me. You may not discuss, other than as required to inform your military superiors of your duty status, your detail to this Commission as a prospective member with anyone.

3. I do not expect that you will be involved in any proceedings until September at the very earliest.

Peter E. Brownback III
COL, JA
Presiding Officer

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1

Fellow members of the Commission. Please read these instructions immediately, sign the bottom, and return the signed copy to me.

Your duty as a potential Commission member does not begin until Monday morning at the earliest. The necessary logistical arrangements to bring members of the Commission, the prosecution, the defense, and support personnel to Guantanamo will bring us into close proximity while traveling to Guantanamo and in-processing there. Until such time as you are advised by me that you may discuss matters involved in this case, you may not discuss with anyone – not even among yourselves – anything about the Commission trials or the cases that may come before it.

After we arrive later today, there will be in-processing and you will be taken to your billets. An assigned bailiff will be your driver. On Saturday, we have arranged a private fence line tour. On Sunday, we have arranged a private boat cruise. Enjoy the NEX, the sites, the varied eating establishments, and the broad variety of MWR activities. You will also note that each of your rooms has cable TV.

Do not at any time visit or attempt to visit any of the detainee areas. The bailiff has been instructed not to take you in the area where those facilities are located. Should you see members of the media, avoid them. If approached by the media, walk away and do not even listen to question they may ask. If confronted by the media, refuse to speak to them and refer them to a Public Affairs representative. The same rules apply to official Public Affairs representatives, except that they should be referred to Mr. Hodges.

Mr. [REDACTED] is the Assistant to the Presiding Officer and is responsible to me for making logistical and administrative arrangements. You may think of him as a Clerk of the Commission. The Commission will also be assigned a bailiff. [REDACTED] and the bailiff will work with you on strictly administrative and logistical matters. Because Mr. [REDACTED] and the Bailiff are not members of the Commission, you must strictly observe the following rules:

- a. You may not ever discuss any case, or the evidence offered in any case, with Mr. [REDACTED] or the bailiff.
- b. You may not ever discuss any case, or the evidence offered in any case, in the presence of the bailiff or Mr. [REDACTED].
- c. You may never seek from, or express an opinion to, Mr. [REDACTED] or the bailiff concerning any case or the evidence offered in a case at any time.
- b. Neither the bailiff nor Mr. [REDACTED] may enter the deliberation room when closed sessions are in progress. The exception to this rule is that either Mr. [REDACTED] or the bailiff may need to enter the deliberation room during a closed session on an administrative mission – such as to provide paper and pens. In such a case, they will knock at the deliberation room door and announce their presence. Before being allowed to enter, all discussions must stop.

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2

Be cautious about any contact you have with members of the prosecution, defense, security personnel, or the administrative staff, as any such contact could be misinterpreted. Do not go into the defense area or the prosecution area or upstairs in the Commissions building. If outside the building and you see any detainee or detainee security personnel, immediately return to the building. The best advice I can give you is to stay together as a group, or by yourself, while at Guantanamo and do not discuss the Commission or any of the cases until you are instructed that you may do so.

You are reminded of the instructions I provided you before by email, and a copy of those instructions are attached if you wish to refresh your memory.

The bailiff will pick you up and drive you to breakfast at on Monday morning at a time to be determined later. The uniform is Class B - in Army terminology. For Marines, it is Summer Service C. For other services, I will be wearing a short-sleeve open neck green shirt with no tie and with badges but not decorations. Choose your uniform accordingly.

I have received and read the above instructions:

Rank and Last Name: _____

Signature

Date

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3

Fellow members of the Commission. Please read these instructions immediately, sign the bottom, and return the signed copy to me.

Your duty as a potential Commission member does not begin until Monday morning at the earliest. The necessary logistical arrangements to bring members of the Commission, the prosecution, the defense, the prosecution, and support personnel to Guantanamo will bring us into close proximity while traveling to Guantanamo and in-processing there. Until such time as you are advised by me that you may discuss matters involved in this case, you may not discuss with anyone – not even among yourselves – anything about the Commission trials or the cases that may come before it.

After we arrive later today, there will be in-processing and you will be taken to your billets. An assigned bailiff will be your driver. On Saturday, we have arranged a private fence line tour. On Sunday, we have arranged a private boat cruise. Enjoy the NEX, the sites, the varied eating establishments, and the broad variety of MWR activities. You will also note that each of your rooms have cable TV.

Do not at any time visit or attempt to visit any of the detainee areas. The bailiff has been instructed not to take you in the area where those facilities are located. Should you see members of the media, avoid them. If approached by the media, walk away and do not even listen to question they may ask. If confronted by the media, refuse to speak to them and refer them to a Public Affairs representative. The same rules apply to official Public Affairs representatives, except that they should be referred to Mr. [REDACTED].

Mr. [REDACTED] is the Assistant to the Presiding Officer and is responsible to me for making logistical and administrative arrangements. You may think of him as a Clerk of the Commission. The Commission will also be assigned a bailiff. Mr. [REDACTED] and the bailiff will work with you on strictly administrative and logistical matters. Because Mr. [REDACTED] and the Bailiff are not members of the Commission, you must strictly observe the following rules:

- a. You may not ever discuss any case, or the evidence offered in any case, with Mr. [REDACTED] or the bailiff.
- b. You may not ever discuss any case, or the evidence offered in any case, in the presence of the bailiff or Mr. [REDACTED].
- c. You may never seek from, or express an opinion to, Mr. [REDACTED] or the bailiff concerning any case or the evidence offered in a case at any time.
- d. Neither the bailiff nor Mr. [REDACTED] may enter the deliberation room when closed sessions are in progress. The exception to this rule is that either Mr. [REDACTED] or the bailiff may need to enter the deliberation room during a closed session on an administrative mission – such as to provide paper and pens. In such a case, they will knock at the deliberation room door and announce their presence. Before being allowed to enter, all discussions must stop.

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4

Be cautious about any contact you have with members of the prosecution, defense, security personnel, or the administrative staff as any such contact could be misinterpreted. Do not go into the defense area or upstairs in the Commissions building. If outside the building and you see any detainee or detainee security personnel, immediately return to the building. The best advice I can give you is to stay together as a group, or by yourself, while at Guantanamo and do not think about or discuss the Commission or any of the cases until instructed you may do so.

You are reminded of the instructions I provided you before by email, and a copy of those instructions are attached if you wish to refresh your memory.

The bailiff will pick you up and drive you to breakfast at on Monday morning at a time to be determined later. The uniform is Class B.

Original Signed:

Peter E. Brownback
COL, JA, USA
Presiding Officer

I have received and read the above instructions: (After you sign, please return this document to LN1 [REDACTED])

Rank and Last Name: _____

Signature

Date

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5

Administrative items for members.

1. It is hot in GTMO, and on Saturday, Sunday, during travel, and in the evenings, casual clothing (to include shorts at GTMO) is welcome and expected. There are plenty of swimming and MWR activities (bathing suit, running gear, etc.)
2. You will probably be in court 4 days, so bring sufficient class Bs. A washer, dryer, and iron are available in the hooches you are billeted in.
3. A full base exchange and ATMs are available, and there are many different places to eat. But, if you have a favorite snack or brand of something, bring it.
4. Your cell phone will not work here. There is a class A (commercial) line in the deliberation room for your use. There is also a large fridge there as well as, of course, a coffee pot.
5. When you arrive to catch the aircraft to GTMO on Friday, please avoid talking to the other passengers until you are given some special instructions to read.
6. In the deliberation room, we have set up a computer so you can check web-based email. (You will not be able to connect to your organization's email.) However, we have also established email accounts for each of you with a 25 MB storage limit. Those account names are below, and have been activated. You will get the passwords when you in-process the Commissions building on Monday. If you wish, you may have email forwarded to the account, or another web base account. NOTE: The chances are that your military email network will NOT allow you to forward email outside their network unless you make special arrangements. Mr. [REDACTED] advises this CAN be done, it is a matter of talking the LAN administrator into doing it. Otherwise, you will have to have a proxy send emails to your new GTMO account.

(Email addresses of members redacted)

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**REVIEW EXHIBIT 11 IS AVAILABLE UNDER
THE HAMDAN COURT MOTIONS:MOTION TO
DISMISS-UNLAWFUL COMMAND INFLUENCE**

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